# MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY CONCERNING WETLANDS MITIGATION REQUIRED UNDER SECTION 404 OF THE CLEAN WATER ACT

(101-50)

# HEARING

BEFORE THE

## SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT

OF THE

## COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

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(ex officio)

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# MEMORANDUM OF AGREEMENT BETWEEN THE U.S. ARMY CORPS OF ENGINEERS AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING WETLANDS MITIGATION REQUIRED UNDER SECTION 404 OF THE CLEAN WATER ACT

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TUESDAY, FEBRUARY 20, 1990

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 2:00 p.m. in room 2167, Rayburn House Office Building, Hon. Glenn M. Anderson (chairman of the subcommittee) presiding.

Present: Representatives Anderson, Borski, Roe, McEwen, Clinger, Boehlert, Hastert, and Hammerschmidt [ex officio].

Also present: Representatives Nowak, Bosco, and Stangeland.

Mr. ANDERSON. The meeting of the Subcommittee on Investigations and Oversight will come to order.

Today the Subcommittee on Investigations and Oversight will hear testimony concerning the Memorandum of Agreement signed by the United States Army Corps of the Engineers and the United States Environmental Protection Agency concerning wetlands mitigation required under Section 404 of the Clean Water Act.

As stewards of this Nation's streams, lakes, rivers, coastal waters, and wetlands, the Committee on Public Works and Transportation has attacked the problem of water pollution. Though the job is far from finished, we have made significant strides in improving water quality. Section 404 of the Clean Water Act, which regulates dredging and filling of waters of the United States, is an important component of our Federal Water Pollution Control Program. While it is understood that the 404 program regulates but a small percentage of this Nation's wetlands, there is no question that wetlands are immensely important to both the environmental and economic health of the Nation.

Wetlands help reduce flood damage and filter pollutants from storm water run-off. Wetlands also provide indispensable habitat for a wide variety of wildlife, as well as nurturing this Nation's commercial and recreational fisheries.

The Memorandum of Agreement signed by the Corps and the EPA on November 15, 1989, and subsequently revised and enacted on February 7, 1990, is the result of many years of work by both

agencies. I am encouraged that the Corps and the EPA are working together to improve the 404 permitting program. An improved permitting program not only serves the public interest by helping to protect a valuable natural resource, it also serves the public by providing consistency in the implementation of the Section 404 bill guidelines. Hopefully, the Memorandum of Agreement will increase the effectiveness of the Section 404 program by reducing delays in permit processing, reducing uncertainty in the regulatory program, and providing agency field personnel with a framework to better understand the policies and procedures for determining appropriate and practical mitigation under the (b)(1) guidelines.

I know the Memorandum of Agreement has generated a great deal of concern by both the regulated community and environmental groups. Hopefully, we will be able to dispel many of these concerns with our hearing here today.

At this time the Chair recognizes our new ranking Republican member, Bob McEwen, of Ohio. I want to welcome Mr. McEwen to our subcommittee. I look forward to working with him this coming year.

Mr. MCEWEN. Thank you very much, Mr. Chairman. I appreciate that and it is a pleasure to serve with you not only as Chairman of the full committee but this subcommittee. In that vein, I would like to yield my time to the ranking Republican member of the full committee, if I may, the Honorable John Paul Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you very much for yielding and thank you, Mr. Chairman.

Mr. Chairman, I am pleased to join with you and the subcommittee's newest ranking Republican member, the Honorable Bob McEwen of Ohio, as we meet to examine the recently executed Memorandum of Agreement between the U.S. Corps of Engineers and the Environmental Protection Agency concerning wetland mitigation requirements under the Clean Water Act Section 404 permitting program.

The subject of mitigation and mitigation sequencing is a complex one. Although mitigation requirements have long been incorporated into permit decisions, a sharpened focus and renewed emphasis have come about principally because of the President's pledge of "no net loss." As those requirements come to bear, it will be helpful for us to better understand how their implementation will achieve the necessary balance between the need for essential and beneficial private and public development and the preservation and protection of vital wetland values.

Mitigation means different things to different people. Minimization and compensation are concepts that may also require clarification and we all welcome the opportunity to discuss these and related matters with our witnesses.

Mr. Chairman, I again thank you and our ranking Republican for calling today's hearing. I look forward to the testimony of our witnesses and to a better understanding of the role of mitigation and mitigation sequencing in the Section 404 program.

I thank Mr. McEwen very much for yielding.

Mr. ANDERSON. Thank you, Mr. Hammerschmidt.

I have the prepared statement of our colleague from Pennsylvania, Mr. Borski, that I will place in the record at this point.

[Mr. Borski's prepared statement follows:

STATEMENT OF HON. ROBERT A. BORSKI

The Subcommittee on Investigations and Oversight has monitored very closely over the years the implementation of the Clean Water Act's Section 404 Regulatory Program. In 1987, the Subcommittee asked the General Accounting Office to issue a report evaluating the Corps of Engineers' administration of the 404 program.

After the report was issued, the Subcommittee held a hearing in 1988 and urged the Corps of Engineers and the Environmental Protection Agency to reach an agreement establishing a standardized wetlands delineation method as well as arriving at a standardized mitigation policy, implementing the Section 404 (b)(1) Guidelines.

I am happy to note that the agencies agreed on a wetlands delineation manual in January of 1989, and today we meet to examine the new 404 mitigation policy.

I applaud the efforts of the Corps of Engineers and Environmental Protection Agency. For too long, we have suffered through a regulatory program that neither protected this nation's

valuable wetlands nor issued permits with the requisite degree of consistency and certainty that the American public surely deserves.

I look forward to working with the Corps of Engineers and EPA as we work toward the same goal, of restoring and maintaining the chemical, physical and biological integrity of our nation's waters.

Mr. ANDERSON. Mr. McEwen, do you have further comments?

Mr. MCEWEN. Mr. Chairman, if I may say just a word or two.

I join in welcoming the witnesses who are testifying today, particularly Ms. Wilcher's initial appearance since her recent confirmation as the Environmental Protection Agency's Assistant Administrator for Water, and Secretary Page, of course, it is a pleasure to have you before us today as well.

I might also add, Mr. Chairman, that this is—you mentioned my initial appearance as the subcommittee's ranking Republican, having served on this subcommittee for now a decade. I look forward to working closely with you and the other members as we proceed on our agenda for the year.

Mr. Chairman, as you have pointed out and as Mr. Hammerschmidt has added, the Subcommittee on Investigations and Oversight meets today to continue examination of the administration of the Section 404 program authorized in the Clean Water Act. Specifically, we will address the subject of permits for dredge and fill operations in the water of the United States.

While mitigation is, as I understand it, nothing new and, in fact, has been a part of the Section 404 program since the beginning, recent events have brought the concept to the forefront in the continuing debate over wetlands issues. As Mr. Hammerschmidt noted, the President stated in his campaign a goal of no net loss of the Nation's wetlands. Since the President's pronouncement clearly contemplated some kind of netting out process, it has been widely assumed that necessary developments in and around wetlands would be permitted to proceed but that some form of compensation or mitigation would be required.

That brings us to the second event and the object of today's hearing, the Memorandum of Agreement between the U.S. Corps of Engineers and the Environmental Protection concerning the appropriate levels of mitigation that may be required as a condition of Section 404. I won't retrace the tortured path that lead to the MOA's execution on February 6. Suffice it to say that the document, as originally proposed and ultimately formulated, has been the subject of considerable controversy.

I am pleased that the subcommittee has the opportunity today to review the MOA, aided by the testimony of the two persons whose signatures appear on the document. While I understand a natural inclination to want to look back at the controversial aspects of the MOA's creation, I think it more appropriate that we look ahead to what we can expect from its implementation.

Of particular concern to me is the extent to which the MOA will aid in bringing greater consistency and predictability to Section 404 permits. Time and time again I have heard from permit applicants who object not so much to the fact that they must apply but to the fact that permit decisions are rendered slowly and on obviously shifting criteria. Those people say if the Corps would just put us on clear notice as to what we can and cannot do, it would be

much easier. Actually, they use stronger words, but I think you get the idea. I would imagine that most of our subcommittee colleagues have had similar communications from their people at home.

With that in mind, Mr. Chairman, I hope that our witnesses are prepared to address those kinds of questions and I look forward to a productive session.

Thank you, Mr. Chairman.

Mr. ANDERSON. Mr. Stangeland.

Mr. STANGELAND. Thank you, Mr. Chairman, for allowing me to sit here on your Investigations and Oversight Subcommittee, of which I am not a member, but am a member of Water Resources Subcommittee, the ranking Republican. I think we can learn a lot from your hearing today. We are going to be taking an in-depth, overall look at wetlands.

Certainly the MOA may be one of the many necessary steps towards spelling out details of the new goal of no overall net loss but I think it has to consider a few things. It must provide adequate flexibility to consider site specific factors and regional differences. I think it also has to recognize the merits of off-site, out-of-kind mitigation and opportunities for mitigation banking, taking into account other matters within the public interest such as transportation, housing, energy needs. And, it must emphasize the interim goal of no overall net loss of wetlands. Without such flexibility and creative innovation, we will have no realistic hope of obtaining our stated goal.

I welcome our witnesses. I congratulate Ms. Wilcher on her new position and look forward to working with her. Also, let me welcome Secretary Page. I look forward to working with you, Mr. Secretary, now as well when our Water Resources Subcommittee begins hearings on the Omnibus 1990 bill and other matters.

Thank you very much, Mr. Chairman.

Mr. ANDERSON. Thank you.

Our panel today consists of the Honorable Robert W. Page, the Assistant Secretary of the Army for Civil Works, and he is accompanied by Mr. David Barrows, Assistant for Regulatory Programs, U.S. Army Corps of Engineers; and Ms. LaJuana S. Wilcher, the Assistant Administrator for Water, U.S. Environment Protection Agency, and she is accompanied by Ms. David G. Davis, Director of the Office of Wetlands Protection, United States Environmental Protection Agency.

It is customary for witnesses appearing before the Subcommittee on Investigations and Oversight to be sworn in. Would you please rise and raise your right hands?

[Witnesses sworn.]

Mr. ANDERSON. Please be seated.

On the witness list, the Honorable Robert Page is first, so you are on, Robert.

**TESTIMONY OF HON. ROBERT W. PAGE, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS, ACCOMPANIED BY DAVID BARROWS, ASSISTANT FOR REGULATORY PROGRAMS; MS. LaJUANA S. WILCHER, ASSISTANT ADMINISTRATOR FOR WATER, U.S. ENVIRONMENTAL PROTECTION AGENCY, ACCOMPANIED BY DAVE DAVIS, DIRECTOR, OF WETLANDS PROTECTION**

Mr. PAGE. Thank you very much, Mr. Chairman. I will read a brief statement and then, if I may, I have a more lengthy and complete statement which I would like to submit for the record.

Mr. Chairman and members of the subcommittee. I am Robert W. Page, Assistant Secretary of the Army for Civil Works. With me today is Mr. David Barrows, Assistant for Regulatory Programs.

I am pleased to be here this afternoon to discuss the recently signed Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army. The MOA, which was implemented on February 7, 1990, provides general guidance on the type and level of mitigation required under the Clean Water Act Section 404 (b)(1) Guidelines.

The MOA culminates a number of years of hard work and represents a very significant step forward towards accomplishing our responsibilities under the Clean Water Act.

As you know, protecting and wisely managing our Nation's remaining wetlands has moved to the forefront of the Nation's environmental conscience. President Bush has stated that his Administration will protect and preserve wetlands and adopt a national goal of no net loss of these valuable aquatic resources. The mitigation MOA is consistent with the President's goal and affirms the Army's existing policy of striving to avoid adverse impacts and offset unavoidable adverse impacts to aquatic resources.

It is important to note that the MOA is not in and of itself a no net loss policy, and neither the Section 404 program in general, nor the MOA in particular, can be expected to achieve the national goal of no net loss of wetlands. The Corps will strive to advance the President's goal of no net loss of the Nation's remaining wetlands through our regulatory programs. However, the MOA clearly recognizes that within the context of the 404 program, only mitigation which is appropriate or practicable will be required.

The MOA interprets and provides internal guidance and procedures to the Corps and EPA field personnel for implementing existing 404 permit regulations. The MOA does not change substantive regulatory requirements, but instead provides general guidance for considering mitigation so that all Corps and EPA field offices will follow consistent procedures.

In closing let me say that this year begins the Army's second century of regulating activities affecting the Nation's waters. We are very proud of our regulatory program and look forward to the years ahead of us. The mitigation MOA, along with the recent enforcement and jurisdictional MOAs and the Federal Wetlands Delineation Manual set the stage for what I believe to be a new partnership with EPA. This can only strengthen our ability to effectively deal with a very difficult and controversial regulatory program.

Mr. Chairman, that concludes my statement. I will be happy, of course, along with Ms. Wilcher, to answer any of the subcommit-

tee's questions. We are looking forward to it. There were some very interesting comments made by the Congressmen prior to this statement.

Thank you so much, Mr. Chairman.

Mr. ANDERSON. Ms. Wilcher, you may proceed.

Ms. WILCHER. Thank you. Good afternoon, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to be with you today to discuss the Memorandum of Agreement between EPA and the Department of the Army. With me today is Mr. David Davis, the Director of the Office of Wetlands Protection at EPA.

Before I discuss the MOA itself, I believe it is important to briefly review EPA's authorities under the Clean Water Act and to provide a little background regarding the development of the MOA. The Section 404 permit program regulates discharges of dredged or fill material into "waters of the United States," a term which includes wetlands. The permit program is administered by the U.S. Army Corps of Engineers. The Corps, under the Act, coordinates the review of permit applications and, based upon this review, decides whether to issue a particular permit. The Act requires that the Corps, when making this decision, apply environment standards contained in the Section 404(b)(1) Guidelines, which were promulgated in 1980 by EPA in consultation with the Army Corps of Engineers. These guidelines establish the cornerstone of the Section 404 program. The basic concept of the Guidelines is that dredged or fill material should not be discharged into an aquatic ecosystem unless it can be demonstrated that (1) the discharge does not have unacceptable adverse impact on the environment, and (2) there are no less damaging environmental practicable alternatives. The Guidelines further require that no discharge should be permitted unless appropriate and practicable steps have been taken to minimize the potential adverse impacts on the aquatic ecosystem.

The principal focus of the Guidelines is to seek first to avoid the alteration or the destruction of wetlands through a careful evaluation of the practicable alternatives. This helps protect our valuable wetlands.

The requirements for mitigation under the Guidelines have not always been uniformly implemented, which has generated some uncertainty and some disagreements between EPA and the Corps of Engineers. In response to this problem, EPA and the Corps have worked, as you have noted, for years to clarify the mitigation requirements under the Guidelines. We intended, when signing the MOA, to articulate the policy and procedures to be used by agency field personnel to determine the mitigation required to meet the Guidelines.

The effective date of the MOA was extended until February 7, 1990, to provide the opportunity for interested Federal officials to discuss the MOA. These discussions were useful to us and resulted in several clarifications. The changes were not intended to alter any of the regulatory requirements or any of the provisions of the Guidelines. The revised MOA became effective on February 7th.

The MOA clarifies a number of different issues, including sequencing. Mitigation under the Guidelines occurs in a clear sequence of avoidance, first, minimization, second, and lastly, compensation of unavoidable impacts through restoration or wetlands

creation. There is flexibility in the MOA regarding application of the sequence in circumstances in which the EPA and the Corps agree that sequencing should be avoided, such as times to achieve environmental gains, avoid environmental harm, or in circumstances that would involve only insignificant environmental losses.

The MOA recognizes that mitigation banking may be an acceptable form of compensatory mitigation. And, the MOA also provides that compensatory mitigation is the objective for unavoidable impacts to off-set environmental losses.

In general, we believe that, at a minimum, mitigation should provide one-for-one functional replacement of wetlands. When there is not a clear understanding of the functional value of the wetland and there is no strong evidence of the value, you can use one-to-one acreage replacement as a surrogate for the no net loss of functional values in the absence of such information.

The MOA also provides that the Corps will strive to achieve the Administration's goal of no overall net loss of wetlands, recognizing that compensatory mitigation may not, in each and every permit decision, accomplish that goal.

We expect the Domestic Policy Council Interagency Task Force on Wetlands will promptly pursue the definition of "no net loss" and develop recommendations for attaining the goal of "no net loss" of our Nation's wetlands. As part of that process, we expect the Task Force to hold a series of public meetings around the country to solicit public views on appropriate strategies for achieving "no net loss."

EPA and the Corps will review the MOA following the completion of the DPC's Task Force recommendations and ensure that our Agency guidance is consistent with those recommendations.

In conclusion, I would like to emphasize that the MOA, and the permit process that it is written to support, are based on existing regulations that remain unchanged. These regulations, in turn, are based on the statutory language of the Clean Water Act. The principles embodied in the Guidelines have been refined by years of experience in the regulatory program and the MOA is intended to reflect these principles and experience rather than supplant them.

I am confident that the MOA will improve the effectiveness of the 404 program by improving consistency and predictability. In addition, I believe as important as the effective operation of the program, the spirit of cooperation that now exists between EPA and the Corps can benefit applicants, developers, and the government itself as we move the process forward.

I appreciate the opportunity to represent EPA at this hearing and to provide our perspective on the new Agreement. With that, I will conclude my formal remarks and ask that a copy of my statement be placed in the record in full, and I will be pleased to answer any questions that you might have.

Mr. ANDERSON. Thank you. Your statement will be in the record in full. I do have some questions that I will probably direct to both you, Mr. Secretary, and you, Ms. Wilcher, because they kind of work both ways.

My first question is. Why did the Corps and the EPA decide to implement this mitigation policy with a Memorandum of Agreement as opposed to issuing a new regulation?

Mr. PAGE. I'll start off, Mr. Chairman. As Ms. Wilcher, we had been working on this MOA for approximately five years. It was our opinion and that of our counsel, later by Justice Department, that this was not a rule-making situation, that it was an implementation to the existing 404(b)(1) guidelines. It did not require new regulation.

Does that answer——

Mr. ANDERSON. All right. Yes, I think so. Ms. Wilcher, do you have anything to add?

Ms. WILCHER. No, sir. As I said, I think we have a new spirit of cooperation here. We have really spent a lot of time talking about this. In general, I think I will have very little to add one way or another. I think it is important to note, though, that this is considered by counsel to be an interpretative rule and being consistent with the guidelines would not require any additional notice or comment.

Mr. ANDERSON. How long have the Corps and the EPA been working on a standardized mitigation policy?

Mr. PAGE. To go back, Mr. Chairman, I would state that it has been approximately five years. Even after we started that five years ago, there have been hearings that have taken place, maybe three years ago, approximately, in which we were directed to bring about a Memorandum of Agreement or such a document which could bring consistency into this program. That further spurred us on to work towards this MOA.

Mr. ANDERSON. That all right?

Ms. WILCHER. Yes, sir. The only thing I would add is that I think Mr. Barrows was testifying before a Senate Public Works and Environment Committee back in 1985 when this issue was raised.

Mr. PAGE. Yes, that was Senator Byrd's.

Ms. WILCHER. In the short time that I have been back at EPA, which has been first as a consultant in July, and then after I was confirmed in October, I, too, like many of you, have heard comments from applicants who were dissatisfied with the speed at which the permits were being processed. They were asking us for clarification of the existing Guidelines. That was an additional motivating factor for us to try to go ahead and get something that set out in clear language what the Guidelines meant and how they should be interpreted in the field.

Mr. ANDERSON. Why did the White House and the Domestic Policy Council get involved with a Memorandum of Agreement that concerned mitigation requirements already found in Section 404(b)(1) Guidelines?

Mr. PAGE. Mr. Chairman, I think that our previous statements and those of yourself and others probably makes that clear. It brought about a lot more conversation than we expected. A great deal of pressure was brought to bear by a number of agencies outside the Federal Government which were directed to the White House and to the Domestic Policy Council to the point that the Domestic Policy Council finally decided to call a meeting with us and make some determinations. One of the first determinations being was this thing considered to be in the rule-making posture, the first question you asked; and to bring other agencies of the Government in to satisfy some of their questions as to the interpretation

of this, why it was being introduced at this particular time, and why it was not being reviewed by other Federal agencies.

Mr. ANDERSON. Do you have something to add, Ms. Wilcher?

Ms. WILCHER. No, sir. I thought you were asking if I were in agreement and I am.

Mr. ANDERSON. Okay. Does the Corps and the EPA expect the White House and the Domestic Policy Council to be involved in further regulatory guidance as it is transmitted to the Corps Districts and to the EPA Regions?

Mr. PAGE. I'm hugging the microphone, Mr. Chairman. Do you mind if I let her answer that one first?

Ms. WILCHER. Mr. Chairman, it would be my expectation that until the DPC Interagency Task Force completes its determinations concerning the definition of "no net loss" and how we might best achieve it in the country, the issues of wetlands are going to be of interest not only to EPA, the Corps and the members of the committee, but also to a broad range of Americans. I would expect that the DPC Interagency Task Force would want to review any interagency agreements that would be coming forward until such time as they complete their determinations.

Mr. ANDERSON. The Memorandum of Agreement allows deviation from mitigation sequencing when the Corps and the EPA agree that the proposed discharge can reasonably be expected to result in insignificant environmental losses. Now what is an insignificant environmental loss?

Ms. WILCHER. Mr. Chairman, in the preamble to the 1980 Guidelines, there is language that says that when there is no significant or easily identifiable difference in an impact—that's an environmental impact—that an alternative doesn't really have to be considered as strictly. We don't have a formal definition for what significant would be. It is something, as the preamble says, more than trivial. However, that is the type of case-by-case determination that we expect our Regional and field personnel to be making using their judgment as good managers and engineers.

Mr. ANDERSON. Do you expect this exception to be used often?

Ms. WILCHER. It would not be my expectation that it would be used often although the Corps will be reviewing the permits and issuing them, so, I should defer to Mr. Page.

Mr. PAGE. Mr. Chairman, I wouldn't think so about insignificant environmental losses.

Mr. ANDERSON. We're going off on a kind of a new thing here today, I mean, this whole business, and I am just kind of wondering what we expect. I should shut up right now but I have been in Congress here roughly 22 years, but I have been in government 50 years. I remember in the old days in California when we had these problems, and we had to build a highway through an area and we destroyed the wetlands. It was automatically expected out there that we would find an equal amount of wetlands somewhere else, either in the northern or southern part of the State; and we did it ourselves. There was no EPA, I don't believe, I am not even sure there was an Army Corps of Engineers; there may have been, but we were doing it ourselves.

Mr. PAGE. They go back 100 years.

Mr. ANDERSON. It was a back and forth thing. Now we find ourselves detailing two different agencies to do a job, and how they are going to work it is going to be kind of fun to watch it.

I have some other questions but I think I will let somebody else ask their questions first and then I'll finish my questions.

Mr. McEwen.

Mr. MCEWEN. Thank you, Mr. Chairman, and I thank witnesses for their testimony.

Let me just begin by talking about a little problem that I have and that is that rules of the committee require that the testimony be submitted two days in advance. Usually there is a crisis that says that it can only come on the day that one is going to testify. So I would like for whoever has to clear the testimony—OMB and all the rest—if you just do what I do with my kids when I run into problems like this: I just tell them it is all due on a Friday, and, sure enough, it would all be cleared on a Friday and then we will have it and then I won't have to be sitting here thumbing through the statements and then mailing questions to you and making it much more difficult. So with that little reminder I hope that next time we can get them in on time just for entertainment purposes.

One of the questions that concerns me is that the Memorandum of Agreement allows discretionary authority for consideration of other agencies' suggestions. How much play do they have? Do they have veto authority? Are their mitigation suggestions going to be accepted carte blanch, or what part will they play?

Mr. PAGE. I'll start with that and then let LaJuana follow. A problem that we have at this time, and I think that I'll go back to what the Chairman stated that 25 or 30 years ago that we regulated ourselves. The government has become very complex, as we all know, and agencies have been established and in those agencies they have been given charters to do certain jobs. Sometimes we cross over with each other and I think the purpose of this Memorandum of Agreement is to help clarify that.

We would like to see not only the joining of EPA and ourselves, but also Fish and Wildlife Service, NOAA, and others. When we can achieve that and get that sort of understanding up front as to where we are going on the direction of these permits, I think that we have satisfied a great deal for ourselves and for the American people.

In cases which we have seen lately, and I use one as an example in Georgia, after EPA and the Corps had agreed on the permitting of a certain project, the Fish and Wildlife Service came in after this was completed and raised objections and wanted additional studies to the point that it was referred to my office. In other words, it was elevated. They did have the right to ask for that elevation. It came, the elevation was not accepted, and it went back.

I don't know of any process right now that we have in the works where one of these agencies can veto. I think the veto power is certainly with EPA. But we do have to come to grips with our working together and causing these problems where we call it the Jack-in-the-box syndrome, where you go through maybe seven, eight years and get to the very end and somebody says, wait a minute, I'm not satisfied. I think that's what bothers you and I think that's what bothers us, Congressman.

Mr. MCEWEN. You're on a roll, keep going. So do they have a veto or not?

Mr. PAGE. They don't.

Mr. MCEWEN. They don't. All right. You mentioned the Fish and Wildlife Service. You are familiar with the Endicott project in Alaska. As I understand it, where the permit applicant wanted to have the gravel, the Fish and Wildlife Service said the caribou are afraid of gravel so therefore they won't cross it, so you have to take 40,000 acres and mitigate it, but you also have to mitigate it with land that has potential for oil production. So underneath it, it has to—what was the terminology they used—it has to have known development potential. See, that really concerns me when the Fish and Wildlife people are concerned as to whether or not the mitigation land has energy underneath it. One would have to be blind, deaf, and dumb not to see that they have another mission in there other than the fish and the wildlife. I am hopeful that this Memorandum of Agreement can make some headway into bringing some sanity to this.

Mr. PAGE. We are talking together now and I think that will hearten a lot of people that we are trying to come to grips with a proper process.

Mr. MCEWEN. Are you a lawyer?

Mr. PAGE. No, I'm not.

Mr. MCEWEN. You're not bad.

Ms. WILCHER. I'm the lawyer of the group.

Mr. MCEWEN. Can you give me some idea, either one of you, about the number of acres of wetland that have been lost under the 404 program in recent years?

Ms. WILCHER. That's quite a tough one. Right now we don't have a good idea about the number of acres of wetlands that are lost annually. The Department of Interior did a status and trends survey that showed that from 1950 to 1970, there was an estimated loss of wetlands of over 400,000 acres per year. Since then other groups, such as the Conservation Foundation's National Wetland Policy Forum, have had other estimates. A GAO report in 1984 estimated that current losses are around 300,000 acres. Of those numbers that range from maybe 300,000 to 500,000 lost acres of wetlands per year, it is estimated that the 404 program accounts for about 20 percent. Multiplied out using a middle figure of about 400,000 acres lost and that would be about 80,000 acres per year under the Section 404 program. But those numbers are pretty soft.

One of the things that the Department of Interior is continuing to do and that we definitely need more information on is the amount of wetlands that are being lost annually and the causes of those wetlands losses. We hope that as we get that information, we will be able to factor that into our decision-making.

Mr. MCEWEN. Thank you. Final question, if I may, Mr. Chairman.

Mr. ROE. Will the gentleman yield?

Mr. MCEWEN. I'd be pleased to.

Mr. ROE. Isn't it also important, however, that we define what a wetland is. It isn't just a filling in of a wetland that destroys the wetland or makes it no longer operative. It can have to do with pollution aspects, it can have to do with chemical pollution, and so

forth and so on. I admire what you said that the figures are soft because I think that somebody has got to come back and say this is 300,000, this is 400,000, that just is not factually true in the sense of what is destroyed by building highways and roads and bridges. I would suggest to you that we probably lose more wetlands because of—and that leads to a point of water resources and wetlands vis a vis the point of pollution, both chemical and sewage and particularly run-off. Would you buy that point of view? Has that been ever analyzed by EPA?

Ms. WILCHER. Again, the Department of Interior has been doing most of the studies and we're trying not to duplicate efforts too much. I would agree with you that our estimate of wetlands losses caused by filling under this program would only be about 20 percent of the total losses. There is also, as you said, chemical contamination losses. We expect that a large amount of losses are also from agricultural drainage, which we do not regulate.

Mr. ROE. If the gentleman would yield just one minute further. I think it is important for us to ultimately get on the record as this matter unfolds is the assumption that because we're building something, that is the destruction of the wetlands, which I don't think is an accurate description at all. I think we have to quantify somehow what really is happening because that determines from a capital point of view do we do additional monies for sewage disposal, do we revise the law as far as run-offs are concerned and the uplands, and so forth, to really pinpoint that down. Is that a fair observation?

Ms. WILCHER. Contamination and agricultural run-off contribute to the loss of wetlands.

Mr. ROE. Well, you have to look at the whole picture. I don't know how you would mitigate—If I have got an overflowing sewage disposal system, or take the coast of New Jersey where we have had people dumping medical waste and so forth. That destroys the whole coastline. One can say that was filled in, somebody put an artificial issue into it, but it had nothing to do with filling the wetlands, it poisoned the wetlands is what it amounted to. That's the point I think we have to stress.

Ms. WILCHER. Yes, sir.

Mr. ROE. I thank the gentleman.

Mr. MCEWEN. I thank the gentleman for his point and would just emphasize my question also is that the 404 program deals with a very small fraction of that. If your overall number was soft, I think the 20 percent of that is even softer. So, therefore, if we could focus on that just a bit, I think that would be helpful to us. As the gentleman from New Jersey pointed out, requiring mitigation for all of this difficulty from a very narrow section is a burden that perhaps we cannot always bear.

My final point, as I was going to say, many people have found from the Wetlands Delineation Manual that their homes and their front yards and their driveways are now wetlands and that if they chose to blacktop their driveway, under this agreement they will need to get a permit. That's frightening to some. How do we deal with that?

Mr. PAGE. That was a question—incidentally, during our discussions with some of the delegations on the MOA, we deviated, I

would say 80 percent of the time, to dealing with the 404 issue. That's sort of where we are getting here now is the overall policy that we're looking at, including this MOA. But Dave may be able to offer something.

Mr. DAVIS. I would like to answer that one, sir. It is a tough issue and it is frightening to a lot of folks. A lot of the agreements that we have reached over the past year, we reached because we had heard from people across this country that sent a message loud and clear that said we don't understand the 404 program and we get mixed signals within the districts and in dealing within the EPA Regions.

In the case of the Wetlands Delineation Manual, the Fish and Wildlife Service, the Soil Conservation Service, EPA, and the Army presumed that whatever it is we were instructed to do within wetlands, you expected us to do it at the same location. Wetlands should be wetlands for all four agencies. So, we took the expertise and experience of those four agencies, put it together in one manual, and came up with a consistent methodology. This methodology has now put a fine edge on where the wetland boundary might lie. In the past, we did have to argue it out quite extensively on a case-by-case. So, perhaps, those driveways were in wetlands in the past, they just didn't realize they were in wetlands.

I guess where you have to strike the balance though is in administering the program within those areas. What is very important in this Memorandum of Agreement and what is penned very closely in the 404(b)(1) Guidelines is that the decisions are based upon reasonable judgement. The decisions are based on whether or not it is practicable to require something.

Thank you, sir.

Ms. WILCHER. Mr. McEwen.

Mr. MCEWEN. Yes.

Ms. WILCHER. I might add that of approximately 75,000–80,000 acres of wetlands alterations per year, someplace in the vicinity of 75,000 of those acres are covered under the Corps general permitting system. General permits are issued on a nationwide or regional basis for relatively minor wetlands losses. Dave or Secretary Page may want to address that further, but, in general, it is a program that accounts for a great majority of the 404 actions that take into account things such as driveways or minor alterations. Sometimes they don't even have to notify the Corps, or sometimes they do it under a very expedited permitting process.

Gentlemen, do you all want to add anything?

Mr. PAGE. Yes. That's for Dave. That's why we gave him the microphone. He's the general man on this.

Mr. MCEWEN. That's fine. Thank you, Mr. Chairman.

Mr. BARROWS. Ms. Wilcher is correct. There are approximately 75,000 activities that are authorized every year by general permit. When Secretary Page remarked earlier that we don't expect the "insignificant environmental losses" to come up very frequently, one of the reasons for that is many of these activities which do result in these very minor losses are already authorized by general permit and, therefore, don't require the case-by-case determination under the 404(b)(1) guidelines.

Another thing that we tried to do within the Memorandum of Agreement is to give credit for advanced planning. Local jurisdic-

tions perform a comprehensive plan in the context of the guidelines, the Corps would issue general permits consistent with that plan, and take some of the uncertainty out of what you have just described. An example comes to mind in the State of Alaska. In the municipality of Anchorage, there are general permits for driveway fills located within the city consistent with that comprehensive plan.

Mr. DAVIS. Mr. McEwen, if I just might add, a comment to tie it back to your question. There is nothing in the new Delineation Manual that in any way changes the general or nationwide permit process. It is simply a redetermination or a clarification of the way in which we decide where the line is on the landscape that marks the edge of a wetland. The general permit program, and, indeed, the individual permit program are unaffected by it.

Mr. ANDERSON. Mr. Borski.

Mr. BORSKI. Thank you, Mr. Chairman.

Secretary Page, when will general permits be revisited? We lose many acres of wetlands through general permits with no mitigation required.

Mr. PAGE. You mean on an individual basis, Mr. Borski?

Mr. BORSKI. Yes, sir.

Mr. BARROWS. We have initiated within the Corps of Engineers now a reevaluation of the nationwide general permit program consistent with the President's wetlands initiatives and we are contemplating a proposed rule sometime this year in that regard. As far as the regional general permits or the State program general permits, those are reevaluated at the district and division level and some of those are being reevaluated now. But from a national perspective, we are going to review the nationwide permits this year.

Mr. BORSKI. And that will be sometime this year?

Mr. BARROWS. This year.

Mr. BORSKI. I have a question for each of you, if I may. In your opinion, were the changes made to the November 15th agreement that are now contained in this Agreement which took effect on February 7th substantive changes?

Mr. PAGE. No, sir. I don't think they were. I am fairly confident personally that they were not. When we first met at the White House—and I was asked that question a moment ago by the Chairman—there could have been substantive changes. But I personally responded in a letter back to the Domestic Policy Council saying that speaking for the Corps of Engineers that we would not entertain substantive changes. There were some minor, what some people might call wordsmithing, but I don't consider it such.

Ms. WILCHER. And similarly, I believe that the modifications that were made were primarily to clarify the document and to ensure that it was understood to be a Guidance document. It cited the language from the existing Guidelines, which had not previously been in the MOA. But, the modifications were to better clarify and produce a clearer and more understandable document.

Mr. BORSKI. One of the reasons I am so happy over the Agreement that you all have reached is that it should put some consistency in nationwide. That's the point of my question. Do you think that consistency will be changed in any way?

Mr. PAGE. No. Coming from me, personally, not being that long in the government and not a great technician of these Memorandums of Agreement, I can only say that the biggest problem that I saw—still see it, but it is getting better—is the inability of our various agencies to come together with some type of an understanding up front rather than waiting for a laboriously long period and have this thing happen to us at the end. We worked hard at that. We were hardliners ourselves about this sequencing. We revised some of our thinking along with EPA to arrive at how we will consistently approach these permits. That never changed. To me, that was the most important. If we would have had to deal in that sort of arena, I believe that we would have had a longer stretched out period of issuing that MOA, from our standpoint.

Mr. BORSKI. I believe you are each to be commended on that. I think it did hold pretty strongly to the original agreement.

Mr. PAGE. Thank you.

Mr. BORSKI. Do you know when the Domestic Policy Council will finish developing a no net loss of wetlands policy?

Ms. WILCHER. I believe that they are expecting to do that sometime this year.

Mr. PAGE. Yes. The only word—and I think LaJuana is coming from the same place I am—the only word that we had is the President's recent address in Florida in which he stated that he thought we should have a policy of no net loss this year.

Mr. BORSKI. Would it be unkind to say we would have expected to have had it by now from the President's earlier statements?

Mr. PAGE. When you look at this thing, I would think the same thing. But when you look at the complexity of one of these things, just this MOA, how much fuss it kicked up, you can imagine what that no net loss policy will be.

Mr. BORSKI. One final question, Mr. Chairman.

To what extent will the Domestic Policy Council have the power to amend this Memorandum of Agreement? Any?

Mr. PAGE. I don't see any.

Mr. BORSKI. Ms. Wilcher.

Ms. WILCHER. No, Mr. Borski. The DPC is not expected to amend this Agreement. It is expected to try to define "no net loss" and come out with recommendations on a broad policy perspective for achieving that goal. In terms of wordsmithing this document any further, I would not expect to see that. As we stated in the preamble to this document, I would expect us to look at it again in the context of what the DPC Interagency Task Force recommends.

Mr. BORSKI. Okay. Thank you very kindly. Thank you, Mr. Chairman.

Mr. ANDERSON. Mr. Clinger.

Mr. CLINGER. Thank you very much, Mr. Chairman, and thanks to our witnesses for your testimony here this afternoon.

Just a couple of questions. To what extent, if any, did you seek input or counsel from groups that may potentially be affected? I represent a rural agricultural district and I am interested in knowing how much effort was made to outreach to the agricultural community to address some of their concerns, some of which, I must say, seem quite legitimate to me.

Mr. PAGE. Mr. Clinger, prior to this thing coming to its issuance on February 7, we had I believe three years consecutively that we had the National Wetlands Forum, I believe that was the name, which met here in Washington. Represented in that group were industry, the oil companies, all environmental groups, and agricultural. We wrestled with all of the issues which we thought would be paramount in establishing a no net loss policy. We felt that we had come to some kind of a general agreement that everyone knew where we were coming from, that we did not feel that this was a surprise; but we were surprised that it was a surprise.

We also went out to some States and talked to some of the governors which we felt had progressive programs that they were working with. We spoke to some members here on the Hill. I think that LaJuana can give you more. I felt that we had really covered it in our Wetlands Forum.

Mr. CLINGER. Was the Forum basically under the aegis of both the Corps and EPA, or was it primarily a Corps operation?

Mr. PAGE. It was at the time the EPA's idea to put this together. I think it was jointly sponsored by a number of our major environmental groups, and then later joined by all of the other groups, industry, agriculture, so forth.

Mr. CLINGER. Yes, Ms. Wilcher?

Ms. WILCHER. In addition, as Mr. Page has mentioned, I believe the Soil Conservation Service was represented as an ex officio member of the Wetlands Forum as were the Department of Agriculture, EPA, the Corps, Interior, and NOAA. So, there was input from these departments.

In addition, when we published this in the Federal Register, we got comments from a whole range of people. Some agricultural groups, as well as other interested groups, made comments on it.

The third thing that I would add to Mr. Page's comment is that the Department of Agriculture did have a representative who participated in discussions on this document in the DPC Interagency Task Force process. So we felt like we had adequate opportunity to get input from the Department.

Mr. CLINGER. Okay. Would you just review what was the grassroots—I mean, I understand the Department was involved. To what extent were efforts made to get the input from the Farm Bureau, for example, or those groups?

Ms. WILCHER. The Farm Bureau called me. We did try to be cognizant of the concerns of agriculture even though most agricultural activities are not covered by this program. Normal farming operations are exempted from this program. But we still did try to be cognizant of the concerns of agriculture as it was developed.

Mr. CLINGER. Okay. That leads me to my next question, having to do with the normal farming exemption. I think, I am not sure whether you would agree with this or not, but my information is that it has really been plagued by somewhat inconsistent interpretation because of perhaps the tension between EPA and Corps and the Region and District offices, and so forth. In addition, not all necessary farming activities are covered by the exemption. My question is couldn't these people, those that perhaps are not covered by the exemption, be unintentionally and severely impacted by your proposal?

Mr. PAGE. This MOA really does not change the intent or the working arrangement against the legislation on the 404(b)(1). So I don't see that this would make any difference to them. If there were problems that they have had—and there certainly have been some because we've heard them and we're well aware of them, Congressman Clinger—those were there before this MOA. They have been there for some time under the 404(b)(1) guidelines. That has been addressed a number of times and we're very well aware of that situation.

Mr. CLINGER. But you don't feel that this is going to expand that concern?

Mr. PAGE. No, sir. I don't.

Mr. CLINGER. And you don't feel there is any need to review whether other activities should be included under the normal farming exemption?

Mr. PAGE. Not under this. I think where you would be wanting to direct that, and they will have a great deal of input, is as we start to move into the overall no net loss policy. There, everyone, as Ms. Wilcher said, in these public hearings, will have much more in-depth opportunity to address these issues.

Mr. CLINGER. I just have one further question. Won't the impact of the mitigation policy be considerably larger now because of the 1989 Wetlands Delineation Manual? I understand the new definitions increase the amount of land which will be subject to the jurisdiction under the 404 program, and that combined with the Delineation Manual, isn't that going to make it a much larger situation than we have had in the past?

Ms. WILCHER. It is my understanding that the Wetlands Delineation Manual, which was completed earlier this year, is not really an expansion of jurisdiction, instead, it is a clarification. We had four different agencies who looked at what a wetland was somewhat differently. And, again, the public was clamoring for some help and some guidance and some consistency throughout the country in terms of jurisdictional issues. It is my understanding that the Manual really didn't expand the definitions so much as it clarified them, in order to provide consistency throughout the country.

Mr. CLINGER. Did you make any attempt, or was any attempt made to determine how much, if any, new land might be regulated and, of that, how much might be agricultural land that could be affected by it?

Mr. BARROWS. We're nearing the first anniversary of implementation for that manual. As a result, the four agencies that signed the agreement and have been using the manual convened a meeting in December with follow-up meetings last month to evaluate implementation, make some determinations concerning how good our report card is concerning implementation, and some assessment as to whether or not we need to change some of the science or some of the assumptions that went into the manual. So we are in that evaluation mode right now. We would be better prepared in a few months to respond on that.

Mr. CLINGER. So that could be taken into account at that point. Just one of the complaints that I have had from some of my farmer constituents is that in some cases land which has been farmed for

generations is now classified as wetlands; and, in some instances, without the knowledge of the landowner, he is not even aware that this is being done. Is that really do you think a good policy that we do these things in a somewhat arbitrary way?

Mr. PAGE. Well, on the surface, it doesn't appear to be. Again, we really have not in our two agencies covered much on no net loss or wetlands with agricultural communities. I can say, if it is any comfort, that there has been a great deal of discussion from agriculture after we put this MOA out. They have probably made themselves more visible than they ever have in the past in the 404 program. They are going to be quite prominent in the no net loss——

Mr. CLINGER. You can count on that, yes.

Mr. PAGE. One statement that was made to us, it came in the form of a letter, "we support no net loss of wetlands as long as there is no net loss of farm lands."

Mr. CLINGER. That creates a nice——

Mr. PAGE. It has a ring to it.

Mr. CLINGER. Little tension there, yes. Well, thank you very much. Thank you, Mr. Chairman.

Mr. ANDERSON. Thank you, Mr. Clinger.

Mr. Roe.

Mr. ROE. Thank you, Mr. Chairman. At the outset, let me thank both of you for joining with us and the other folks that are here because I think we are at least headed in the right direction. However, having said that, and may I preclude with no aggrandizement, having helped to write these legislations over the last few years, the last 21 years, some things puzzle me. We have got some crazy cases. For example, we had a case in one area that was a 13 acre parcel of land—this is in the New York metropolitan region, the great State of New Jersey, by the way—and someone had determined there was a third of an acre of wetlands involved. When we analyzed the situation in the field, we discovered that about 25 years ago they had put in a drainage line and diverted just run-off water and it pooled in one section of this particular 13 acres of land. It took us exactly two and one half years before that problem could be resolved. Now, you say, okay, fine, we've heard that before from other areas. Big deal.

What policy do we have that protects the wetlands once they are declared wetlands. Here we have thousands of permits involved with a quarter of an acre here, a tenth of an acre there, a spoonful here, and so forth. And once we've gone through hundreds of thousands of dollars and time and we've set aside that spoonful or that quarter of an acre, that's the last you hear about it. Nobody does anything about monitoring it. Nobody does anything about inventorying it. Nobody does anything about maintaining it. And what have we discovered in our State? We discovered in our State, after years of this work going on, that those same quarters of an acre or third of an acre had been filled in; there are parking lots on them, and so forth and so on; and nobody went back to check.

Now what am I trying to say? It seems to me to be a failed policy and that's part of our fault. It is ludicrous that we should be going through these kinds of expenses and so forth, setting aside a little piece here and a little there without looking at the full wetlands problems as it really is, in my judgment. Therefore, I hope that as

we mature in this exercise, that we look at not the regulatory end and more writings and more forms for God's sakes, but we're looking at some way to be able to solve a problem legitimately in the interest, as you so well said, Administrator Wilcher, in reference to the point of view of the people's need for wetlands. So because of our ineptness and our inability to get the thing done, we're doing more damage than if we had left it alone in the first place, in my opinion.

Second case. In my district there is on Route 23, I won't bore you with details, there is an urban renewal program which we have spent $70 million on, $70 million. I have been trying for three years to get a decision out of the New York Corps Region—if they were here, I'd tell them to their face, and they are good people, they are trying—to try to be able to get the matter resolved. We've built a whole interchange that we can't connect the two pieces to the other roads because they are wetlands. I-287 they built, mitigating lands. They came back and said well, on I-287 we will mitigate these lands and they go ahead—and I am leading to a point—they go ahead and they take the very same area along the flood plains, they declare that mitigating lands, which was there in the first place and didn't solve a thing to begin with.

Now, again, what am I trying to say? I think we have to say to the States there ought to be set aside major wetland trust areas of a State. We have it in the Great Pea Swamp in the meadows along the flood areas. If the State would designate those areas, then it would appear—and I think each State should do this—then it would appear that we could truly set up a compensating land program where we could come back and say in that flood river basin over there that area is delineated by the State and the point of view of being considered wetlands and if builders have a quarter of an acre or a third of an acre, if they have to put up three-for-one in the State trust wetlands, at least we would be doing something that is constructive and is creating, you know, recharge areas and the whole thing we're trying to work on. It seems to me that we ought to be—and this is probably heresy, this is an election, everybody is running for election—I am for wetlands. I want to say that for all the environmentalists in this room. We wrote it into the Water Resources Bill, as you know, Bob. Where I am coming from, I think this system is failing because we're too involved in regulatory than we are in setting up what we mean by wetlands and what we want to set aside as wetlands.

I have another situation in that very same area, and I want to ask you this as a question, specifically, without making a speech, in that one area that I am talking about where this urban renewal program is, the State of New Jersey comes in and they want to build a large transportation garage for buses, okay? They came back and said to the Mayor of the town, well, we're not going to worry about that, we don't have to get a 404 permit. Now, my understanding of the law is it doesn't matter whether it is a State or anybody, if they are subject to wetlands, they have to come before the proper process. Am I right or am I wrong on that?

Mr. PAGE. You're right.

Mr. ROE. That's clear. So I would like to have somebody say to me today, or what your thought process is, if we say that this

Agreement is not going to really change the basic regulatory aspects of it, what is it going to do? I mean, what we have is a situation where the Corps says one thing, EPA says another, and because somebody in EPA has made up their mind in that New York Region about that area that they are not going to, it wouldn't matter if the Corps stood on its head, it wouldn't make any difference. How is this Agreement going to solve that problem? Can anybody try to answer that?

Ms. WILCHER. Well, that certainly is the intent of the Agreement because, believe me, we don't like to hear those kinds of stories any more than you do. We think the MOA will clarify what the existing Guidelines say. However, I agree with you that the regulatory program that EPA and the Corps operate is not the way to protect the wetlands of this country. It has to be much broader. And that is something that goes far beyond the scope of what EPA and the Corps do. We are hoping that the DPC Interagency Task Force will be able to address that—hold public hearings, get comment from all interested parties, and come up with a sensible policy.

Mr. ROE. Let me make one more point, if I may, Mr. Chairman. You know, we had another case in another congressional district in my State where the EPA called me up and they said, well, you know, that's part of the wetlands. I said, well, come with me. We chartered a helicopter and flew up there to look at it. It wasn't there. It never was there in the first place. The area had a tennis court on it and they considered it wetlands. Now that cost us a couple thousand dollars to try to prove that. And, even at that, we had trouble getting them convinced without going through the regulatory process.

If the Chairman will forgive me, and the members, I'm almost through. I am not dumping on you or unloading my irritation or my frustrations. But I would hope one thing, that as a result of this hearing and hearings that our Chairman is going to run on the Water Resources committee, that we would be honest with ourselves and would come up and say that in order to properly protect the wetlands in this country, we need revisions in the legislation that is involved to set the proper format to do it. Is that a fair commentary to make? Are you satisfied we can protect the wetlands with the present 404 permit system, including this particular Memorandum or any other memoranda, without altering the law?

Ms. WILCHER. I don't think that alone will protect the wetlands of our Nation. Again, the regulatory program, as you've said, is such a small piece of what needs to be done to protect wetlands.

Mr. ROE. I'm an old salt, my dear. I am asking a simple, very basic question, and I don't mean to be rude or facetious in any way. It seems to me that as we go through the drill and we look over the program, everybody wants to regulate. Regulate. Regulate. Get more lawyers, you'll pardon the reference. Regulate. Regulate. We'll do this, fill out more forms, and so on. If it is not solving the problem, I would think that members of government are there to resolve the problem. The question fundamentally before us is are we or are we not protecting the wetlands of the people of this country in the present posture of the legislation we have and the regulatory process. If the answer is no, which it should be, should we

not then expand and clarify what we mean in the law. That's a simple question that I am asking. If that makes any sense.

Mr. PAGE. Let me—Mr. Roe, what we're doing in 404 and what is happening with this MOA is one thing. What you said is another. You have brought up three very important points, and I would like to reiterate those, because we are well aware of them, and it is something that has to be done to answer the problems that you and others have here in regard to where are we going with this wetland situation. We hope that through this Domestic Policy Council that we can come to grips with these problems.

First, the big one is measurement. There are different kinds of wetlands. There are ones where guys throw rubber tires out there, and then there are other pristine ones. How do you measure one against the other when you evaluate it.

Second, is size. Teaspoon versus a lake. There has to be some agreement on the magnitude.

And third, and very important, as we have talked about and will discuss during the course of this year, is land banking. That's where I think that we will probably be able to clarify some——

Mr. ROE. If the committee will indulge me just one more second. Do you believe that we can control and develop and improve our wetlands situation with the existing law as it is, or do you think that we are going to need modifications?

Mr. PAGE. I am not sure if legislation will do it. If it would help, yes. I would first of all like to see you——

Mr. ROE. Would you indulge me, Bob. We wrote this legislation. We know what we wrote into the legislation in 1972. Where I am coming from is I think the legislation is faulted at the present time. Do we solve the problem with regulatory ends and hearings and endless whatever, or do we come back and clarify the issue to improve the wetlands situation by clarifying the issue? Do you think you can do it by regulation?

Mr. PAGE. I think you can look at it when we finish with this wetlands policy. Does this clarify, does this expand on the present legislation, and if it doesn't, at that time I——

Mr. ROE. How are you going to regulate the Agreement with the State? If we suggested the States ought to have matching money or something to set up their land banks and their wetlands banks, how would we do that by regulation?

Mr. PAGE. I think that we're looking now at another point that I think you brought up. You cannot come up, I don't believe, with a national policy for this. It is going to have to be localized.

Mr. ROE. I don't know why.

Mr. PAGE. Well, you cannot create the same kinds of wetlands in Arizona that you would in New Jersey.

Mr. ROE. Of course not, but you could set up trust funds and trust banks and so forth.

Mr. PAGE. Yes, we could——

Mr. ROE. I have exhausted my time, Mr. Chairman. Thank you very much.

Mr. PAGE. I don't think we ever answered the question.

Mr. ANDERSON. Mr. Stangeland.

Mr. STANGELAND. Thank you, Mr. Chairman.

I sometimes think that the answer Mr. Roe got to his question was the same kind as the answer that some of my constituents too often get when they try to deal with the Corps and the EPA on the local level.

I want to just start out by saying, first of all, that I am a national trustee of "Ducks Unlimited." In that capacity, I believe very strongly in wetlands. On the other hand, I am like Mr. Clinger. I serve an agricultural district that sits in the eastern edge of what is known as the "Prairie Pothole" region. I would like at the outset to state that much agricultural land has been drained in years past. But that is done. I would hope that as you go forward now you would analyze what has been accomplished over the last five years regarding agriculture drainage. And while agriculture always gets a finger pointed at it, since we passed "Swampbuster," I would daresay that there has been a minimal amount of agricultural drainage of new lands going into production that have been traditional wetlands. And those should stay as wetlands.

I would like to draw your attention to the fact that the public needs the wetlands, wants these wetlands, and I think we ought to have them. We have 30 million acres in the conservation reserve program as of now in this country for fragile highly erodible lands. We have 10 million to go to fill that inventory. There is a moratorium on sign-ups. In writing the 1990 Farm Bill, I intend to offer an amendment to include wetlands into that conservation reserve set aside. Farmers own that land; they pay taxes on it; they get no economic benefit from it, and they want to farm it. The way to prevent them from wanting to farm it is to have the public pay them something for maintaining that wetland for the public's benefit. I hope you will be cognizant of that and maybe even support it when the time comes.

Just very briefly, Ms. Wilcher—you're new and I'm going to say, like my colleague, Mr. Roe, I am not dumping on you, don't misunderstand me—but I like the concept that the MOA allows flexibility when appropriate to avoid environmental harm, achieve environmental gains. One aspect that I guess I am critical of is some of the policies and the regulations and the administration in the past lacking flexibility where flexibility could get some cooperation from rural landowners and preserve the environment.

You know, we have got a ditch problem up there in Stearns County in my district, a very serious problem. It is legal to maintain the ditches. If you want to maintain a ditch, you do not need a 404 permit going through a wetland if you haul the spoil away. But it is illegal to sidecast that spoil in the wetland. Now I can fully understand you don't want to fill a wetland because once you fill a wetland you raise the elevation and you no longer have a wetland. Sidecasting a berm is not filling that wetland.

We also have up there fairly flat land and sloped toward that ditch. And not in recent years have we experienced these, but it is not uncommon to have five, six, seven inches of rain at a time and it causes excessive sheet erosion. Extremely damaging environmentally to the land. Sidecasting berm with a control structure or culverts to release that water in one location or three locations or in a half mile, let's say, and controlling that water to prevent further erosion and damage is a solid environmental program. It would

avoid environmental harm, achieve environmental gains. But it needs a 404 permit. That's the law. And the attitude is there will be no permit to sidecast in a wetland, period. That's a total lack of flexibility.

If you really mean to have flexibility in this MOA, then I guess I would like to know who is going to determine where the flexibility is. Is it going to be the Secretaries at the top? Is there going to be flexibility at the Regional level? Is there going to be flexibility at the local level? Where is it going to be? I like the idea. But I don't like the idea that it is going to allow a loophole. Now I am sure many are going to say, well, this is going to be a loophole to further drain wetlands. It shouldn't be. But maybe this would be a way to preserve wetlands and get better cooperation from the people who have it in their hands to not drain wetlands, to keep wetlands, preserve them.

Certainly I support the goal of no overall net loss and I support the goal of recapturing wetlands through mitigation, through wetland construction, enhancement, wherever that's possible, and I think we have got lots of possibilities for that in this country. There is a lot of land that could well go back to wetlands and should go back to wetlands. Over a period of time, I think that's going to happen.

So that's just some of my comments. I don't know if you want to comment on that today, but we want to work with you and I am going to get into this more in depth when the Water Resources Subcommittee visits with you as well because there are a whole host of other things. I am not a member of this subcommittee, I don't want to take up a lot of time, but these are just some of my concerns and I can elaborate a whole lot more than the one situation of Stearns County ditches.

I would also like to make the point that I think the Corps has Stearns County in a court of law. From what I hear, it is very possible that the court of law is going to rule in Stearns County's behalf. I would hope that the administrators of those programs would take a look at how to ameliorate the situation and not consider going on to further appeals. The government has got a battery of attorneys and they can drag this out. And a local unit of government, like a county, just cannot go through that, they can't afford it. So you win by default in the long run. But maybe you also lose in public relations. So those are things for you to consider.

I thank you for being here and look forward to working with you. Thank you.

Mr. ANDERSON. Mr. Bosco.

Mr. BOSCO. Thank you, Mr. Chairman. I also want to thank the witnesses.

I understand from prior hearings that I have attended that about 75 percent of the wetlands are on private property. I assume that would be true. Which means that we automatically deal with a very contentious issue here in that when people want to make some other use of their property or change it in some way, these permits come into being. But something that bothers me is that I think some of the groups, particularly the environmental groups, often times develop strategies for stopping or delaying something—they don't want a road somewhere, they don't want a housing sub-

division, out in my area they didn't want a vineyard put in, of all things. And part of that strategy has now become hunting for these wetlands, these vernal pools. It can be a totally dry area that looks like a State fair parking lot or something, but if there is an indentation that has cracks in the bottom that for a short period of time during the spring fills with water, then that becomes a vernal pool.

If you can't find that, then you look around for some little flower that depends on the moisture maybe even below the ground and that becomes waters of the United States. And as I understand it, this term "waters of the United States" has lent itself to all of this foolishness; this nickel and diming. As I think Congressman Roe said, our real intention is to have some integrity in the country's preservation of wetlands, to protect these marshes and estuaries and real waters of the United States.

When this happens out in the local areas, I don't need to tell you, it becomes a nightmare. You know, we can sit here in Washington rationally discussing this, but people really get livid about it. The lawyers get involved. We have this one case where these farmers wanted to convert their land to subdivision, which is something a lot of people don't approve of, but they were forced to commission a study and part of this study came out to talk about the diversity of these vernal pools and plants. It commented on the Sebastopol Meadow Foam, which provides a clear example of why it's important to maintain biological diversity. Oil can be processed from the seeds of this plant which is similar to that of the sperm whale. This whale was hunted to the brink of extinction for the production of oils to lubricate delicate machinery. The irony of this situation is that we may be on the brink of losing the only plant that can stop the elimination of the majestic whale species.

The point I am making here is these groups get to this extraordinary contortion of logic to prevent whatever it is they want to prevent from happening. What is it in your Memorandum of Agreement that is going to stop that? You have spent a lot of time and work coming up with some product, now what is going to stop all the baloney that is going on out there about this?

Mr. PAGE. You want to start off with that or do you want me to?

Ms. WILCHER. I will. Mr. Bosco, this MOA really does not address the jurisdictional issues that you are talking about. What it really is intended to do is to address the mitigation issues. And while I certainly do appreciate your concerns, this particular document won't do anything one way or another to change the way that vernal pools or other wetlands areas would be considered from a jurisdictional standpoint. We are hoping that by having consistent guidance an environmental group, a developer, a Member of Congress, or field personnel reading it would have an opportunity to have a clear understanding of how we expect the guidelines to be interpreted. Hopefully, it will provide consistency along with some good sense.

Mr. BOSCO. But nothing in your Memorandum will stop the squabble over what wetlands is or what it is intended to protect, or how small or big it has to be, or whether it is connected to waters of the United States, or any of these? You'll just say that once all that has been gone through and the five or six years of squabbling

is over, then you will be able to tell in a unified way what the mitigation should be?

Mr. PAGE. I think that first of all this Memorandum of Agreement should not be held as an overpowering new document that has come on the scene that is going to enlighten us all on no net loss and how we come across and deal with some of these terrible inequities—and they are, I agree with you, they are. We hoped that we could put something in there that says reasonableness; that we can reason this. To go back to Mr. Stangeland a moment ago, that this would be at a local level, that somebody could use judgment factors down there working within existing legislation. We hope that this is a part. But this is not the answer to that. I wish I could tell you what the answer is. But I think we have got to bring our environmental groups together that are Federal Government groups at the outset to try to cope with these problems before they get too far down the line.

Mr. BOSCO. I am not going to take any more time, but I am confused. You are not dealing with all the issues over what is a wetland, what isn't a wetland, how big, how small. All you are saying is once that has been decided, you are dealing with what you can do to mitigate it, is that about it? So, literally, you almost come in at the end of these debates, don't you? If you don't know what a wetland is, which is ordinarily how these contentious issues start up and you get into all the wild flowers and everything, at that stage one group says we don't have a wetland to even mitigate and the other group says yes you do. You don't get involved in that. You wait until it is decided that there is something to mitigate, is that correct?

Ms. WILCHER. This document does not get into the issues that you are discussing. The Delineation Manual, mentioned earlier, and other documents and other guidance that has been put out previously can address that, this MOA really does not address the types of issues that you are talking about. This MOA is something that comes into the process after many of those questions have been answered.

Mr. PAGE. Just, yes, to your question.

Mr. BOSCO. Okay. Thank you. Thank you, Mr. Chairman.

Mr. ANDERSON. Mr. Hastert.

Mr. HASTERT. Thank you, Mr. Chairman.

I appreciate that last answer. I guess maybe from this point on I am thoroughly confused after listening to the testimony. What is going to change with this MOA? What is changing? What do you do?

Ms. WILCHER. There should be a more consistent application of the existing guidelines.

Mr. HASTERT. Would the gentleman from the Corps, what do you see as a change?

Mr. PAGE. That's exactly as I see it. If I could—I don't know—if I could give a picture of—when a New Orleans District of the Corps of Engineers, working with EPA, both have a different idea of how to approach the sequencing and mitigation of a wetland, and that's different than some of our other Districts and divisions, this not only confuses our own organization, it certainly confuses the nation as a whole.

What we tried to do is to bring EPA and the Corps, their regions, our districts, in concert so that when we approach that mitigation process, that determination, that they would be doing it off the same script rather than extemporaneously in each——

Mr. HASTERT. So you are saying there was inconsistency between the EPA and the Corps previous to February 7, 1990. Let me ask you another question. Has there ever been inconsistency between your regions?

Mr. PAGE. Oh, yes, sir. I think that's——

Mr. HASTERT. Within your own house?

Mr. PAGE. Within our own house, absolutely. Absolutely. That bothered us I think as much or more as the inconsistency that we had with EPA.

Mr. HASTERT. So this MOA takes care of all the inconsistencies that ever happened? I tend to generalize.

Mr. PAGE. Well, it will try.

Mr. HASTERT. Let me tell you, I have been involved in the three years plus that I have been in Congress trying to understand the Corps of Engineers. I sit on Mr. Nowak's subcommittee on Water Resources and we have your Agency before us quite often. The problem that I see is in the relative ease and flexibility that you have in defining what is significant environmental loss. What is it? Who defines that? Who makes that decision? For instance—you don't have to answer all these questions, some I will want you to answer—when do you have to do a case-by-case study to decide something is of the waters of the United States or a wetland or it isn't?

Let me give you a little background. I represent a district in northern Illinois that probably has got more farm land tiled than any other area in the country, and it was tiled over 100 years ago in some situations, maybe 50 years ago in others. But every time one of those tiles clogs up by a muskrat nest or whatever, now we have a little slough slue and those farmers disc over a part of that and all of a sudden they are in trouble and our office gets called all the time. These are little things, we're talking about a quarter of an acre, half of an acre. We've got huge growth out there and so we have people deciding where can we put driveways and where can't we put driveways, and how we do all of this and that, and with minuscule acreage involved. But I have got a 400 acre wetland that the Corps of Engineers says well, we don't know if it is a wetland, we don't care if it is a wetland, from my point of view at least that's the message that I get from them, and you can't tell us if it is a wetland or not. It is that inconsistency, you call it flexibility, that all of a sudden smacks to us as being arbitrary.

We are in a battle with the bureaucracy—which we shouldn't be, we ought to be working together—that is of almost Orwellian proportions. I certainly hope the MOA helps things out. We have, at least in our district and I assume their districts overlap, Mr. Adamkus from the EPA saying, yes, we ought to take a look at this and it is serious; and I have got Mr. Franco from the Army Corps of Engineers saying well, you know, there is no proof that this thing is a wetland, and if you can prove it to us, fine. So we go out and have groups make a study—and this happens to be a study that was just released—that says, yes, this is a wetland. There are 49

heron groups on it. There are all kinds of birds, and I am not an ornithologist, but all kinds of things that say that it is a pretty special area. Then the Army Corps of Engineers says, well, we don't have to look at this. And all of a sudden things don't make sense. When we are scrimping and scraping and you're talking about minuscule acreages and trying to solve problems for farmers and those types of things, and also problems that environmentalists are concerned about, when you have got 400 acres and people put a bag over their heads, you can have MOAs from here to next year and you are not going to solve the problems that we have. I am in a quandary. What in heck do you do?

Mr. PAGE. You're asking?

Mr. HASTERT. Yes. Answer that question for me.

Mr. PAGE. Sometimes we become in quandaries ourselves. But we are making an attempt, and we want everybody's support if we can get it, to try to minimize that kind of a situation. We don't like that at all. It bothers me personally. I know it does LaJuana. We are not going to serve the people of this country if we can't get our own agencies together and be consistent. That is what we have got to do and strive for. I hope, I sincerely hope that this is one step. It is not going to solve it all because it is too big. But at least for this portion, I hope that it will.

Now we hear horror stories every day that are pretty much in line with what you are saying. As long as you are dealing with human beings, you are going to have those kinds of problems. But we have to have a situation where there is not that much autonomy in each one of those Districts. We have to be a little more watchful and consistent. But then, of course, there has to be the flexibility. We talked about that. When you give them too much, somebody is going to go over and use too much authority that they don't have. I just hope that in the long answer to your question that this could be a step in the right direction.

Mr. HASTERT. Maybe the question was longer. To continue one step further, if the committee would indulge me, we tried to walk a tightrope between agencies day in and day out. And the 500,000 or 600,000 people that we represent look to us to solve those questions because we stand for election and ultimately we are accountable where maybe the bureaucracies aren't accountable.

For instance, in my district, we have high radium, naturally occurring radium, deep aquifers. The EPA says, fine, you can mitigate this by blending deep aquifers with shallow aquifers that are fairly pristine that don't have over five picocuries of radium in the water. So then, fine. Now we have a situation where the recharge area for the main shallow aquifer that serves 400,000 people in my district is subject to contamination. When we asked the U.S. Corps of Engineers that has jurisdiction over recharge areas to come in and do something about it, they turned their heads.

So I think there are big problems. I think you ought to get a Memorandum of Agreement and somebody ought to start talking from agency to agency so we can start to solve the problems. I'll tell you, sir. I am on Water Resources and every time you show up I am going to be there too. I am going to be asking these questions and I want some answers. You don't have to give them to me today, but I would like them tomorrow.

Thank you.

Mr. ANDERSON. Mr. Nowak.

Mr. NOWAK. Thank you very much, Mr. Chairman. First of all let me welcome our guests.

There has been an awful lot written very quickly about this Memorandum and the changes from the November 15 Agreement. I think perhaps all the individual problems that were talked about here can be put into a larger scope and that what is happening in the field, from our brief hearings that we had last year, is some development of that kind of cooperation that hopefully will lead to some stability in this area. I visualize this MOA as a step in that direction to tighten it up even further.

But by the same token, we hear individual stories that perhaps don't have the amount of equity that we would like to see in the process. I know that an attempt was made to bring aboard various national environmental groups into the process and make sure that they have had sufficient opportunity to talk about this. Of course, everybody's optimism was raised by the President's statements of no net loss; not only as a campaign view, I hope, but as a sustaining commitment to the changing environment that we find in many areas. And this is one of those that I think has been very contentious. Your attempt, therefore, after many years is admirable. When you look at the overall intent and your original agreement which set forth the sequence of steps a developer or others had to take to obtain a permit, I think it was one which could provide some consistency.

However, I am bothered by the revised Agreement which keeps, as I understand it, those requirements intact but then opens up what I think could lead to excesses on the other side. We note that these steps may not be practicable where there is a high proportion which is wetlands. I understand the concerns of some governors, one from a farming State and one from Alaska, and perhaps other interests that have developed large tracts in wetlands. But I am wondering haven't we, with that statement, not only looked at perhaps a particular situation that was brought to your attention, or brought to the attention of others in the White House and then brought to your attention, opened up a large way of avoiding not only the no net loss goal but also, of course, bringing in a lot of other wetlands that perhaps should not be looked at in that vein and not considered in that so-called exception statement. I wonder if you could comment on how that—because that is really the large change. I think on November 15 you have a broader sector aboard. Am I correct in that assessment?

Mr. PAGE. You are correct. Yes, you are.

Ms. WILCHER. If I may, Mr. Nowak. It appears that you are referring to a footnote to the Agreement. The footnote says "for example" and then goes on to use the language that you are discussing, that it may not be practicable where there is a high proportion of land that is wetlands. That, in reality, is the same approach under the existing 404(b)(1) guidelines. There is nothing in the MOA that says if there is a high percentage of wetlands, mitigation is not required. This is a very different statement and we expect our field to read it as it is. In terms of what is practicable and what is not that is a recognition that in certain areas mitigation may not be

practicable where there is a high proportion of land that is wetlands.

I believe in part that was recognized because the definition of practicable, as set out in the Guidelines that were promulgated by EPA in 1980 and specifically quoted in this MOA, includes things such as costs and technology. It may not be practicable when you consider what the cost to do mitigation might be in an area where there is a higher proportion of the land that is wetlands. So that is what the MOA is intended to do and no more, to recognize that it is an example of a case that may not be practicable. It also may be practicable in those areas.

Mr. NOWAK. On page 7, you refer to the problem in Alaska, talking about where a high proportion of developable land is wetlands and where technical difficulties exist for compensatory mitigation of wetlands underlayed by permafrost. I am just wondering if further clarification couldn't be put in the document to allude to, you know, when you are talking about practicable, we're not just talking about all land of which a high proportion is wetlands. At least you would be limiting the fear that has been expressed of universal application of practicality. As I have had the opportunity to look at some of the——

Mr. PAGE. Yes. That was a very important issue not only with this MOA but how we are going to approach this no net loss policy as we go along. There was discussion about Alaska specifically because of just what you brought up; also Louisiana, which is an enormous wetland area, and they are losing something like 59 square miles a year. How do you set those aside without establishing some precedent, which is what you, I think, are concerned about, leaving a large loophole not only in the MOA but more importantly in what is going to happen in the overall no net loss wetlands. We understand that and will have to deal with that. I don't know if we can do it with this MOA but it will be in the bigger issue.

Mr. NOWAK. Another point that I would like to bring to your attention as you go further. I understand in the Task Force, to fulfill your charter, you are going to be reevaluating this MOA to ensure that you have met your charge and the consistency between the Task Force recommendations and the agencies' guidance and implementation of those regulations. But I found when we went out there was a terrific differential in looking at a wetland not in terms of pure acreage or quantity of wetlands which could be displaced, but in mitigating. You had to be so careful that the quality of that mitigation was at an acceptable level and at least met what you're going to replace. I wonder if that had come out in your consideration as well?

Mr. PAGE. Yes, it has. I think a very important consideration is in the measurement and quality of wetland. That issue was brought up a moment ago and we addressed it but very briefly. That is I think one of the three or four major points that must be addressed in the overall net loss policy.

Mr. NOWAK. This is a part really of the total overall no net loss program we would hope the President will be addressing more broadly as we begin our hearings and look for recommendations to achieve that under the present regulatory framework which is

being operated out in the country. The question was asked earlier I think by Congressman Roe concerning what changes are you recommending for the basic law and the 404 program. You reiterated your limitation here of the MOA consideration. I think you have probably gathered other information that could be helpful and I would hope that EPA could present that to us within the next month as we start to consider the general revision of that 404 program.

Thank you very much, Mr. Chairman.

Mr. ANDERSON. Thank you, Mr. Nowak.

I have a couple of questions that I held off until after I heard from the others. I think they are directed to you, Mr. Secretary, but if any of the rest of you want to add on, please feel free to do so. The Department of Transportation is a member of the Domestic Policy Council. What were some of the concerns the Department had with the Memorandum of Agreement?

Mr. PAGE. I believe that in the first meeting we had, the major criticism that I heard from them was that they felt that this MOA should be one of rulemaking and that instead of it being put out just between the EPA and the Corps, that this should be brought before each of the agencies for their comment. That initially, at that time, was their primary objection.

Mr. ANDERSON. What groups voiced the greatest concerns over the Memorandum of Agreement?

Mr. PAGE. Within the government, Mr. Chairman, or without?

Mr. ANDERSON. Either way. Maybe the government first, then the outsiders.

Mr. PAGE. Within the government, I think that we are all aware that in our meetings that we had a great deal of concern was expressed by the Department of Energy, the Department of Transportation, lesser by the Department of Interior. Outside of the Federal Government, I personally was addressed by a group of Senators, more specifically, with the Alaska delegation, and how they read this MOA and its impact. I believe that under page 7, as Mr. Nowak pointed out, that was brought out in this document.

Mr. ANDERSON. Did you meet with any of these people?

Mr. PAGE. Yes, sir. We did.

Mr. ANDERSON. All of them?

Mr. PAGE. We did. We met with a number of the Alaska delegation, I spoke by telephone—and I'm just saying myself, LaJuana will certainly add to it—with I think six different governors, and I did not, as I recall, speak to any industry group, but we received a great amount of correspondence which flowed to us either directly or indirectly from the oil industry. I believe that's pretty much the criticism that I saw from my side.

Mr. ANDERSON. Ms. Wilcher, would you like to comment on either of those?

Ms. WILCHER. That's generally consistent, although there would be slight variations.

Mr. ANDERSON. Did you meet with some of the people who were disagreeing or raising these objections at the time?

Ms. WILCHER. Yes.

Mr. ANDERSON. How will this Memorandum of Agreement affect the day-to-day processing of the 404 permits now going on in

the Corps district offices? How are they going to handle this out there now?

Mr. PAGE. First of all, a letter that went out both from EPA and from the Corps to each one of the our districts and divisions was a clarification letter as to how we could proceed and process these working in concert one to the other. It is my deep hope that we are going to be able to expedite. We must because in my opinion a normal process of permitting has taken too long.

Mr. ANDERSON. Isn't this going to slow down permit processing?

Mr. PAGE. I don't honestly think so. I can't think that it would. Until they are used to the system, we sent these instructions out, that may be a temporary slow down, Mr. Chairman. But it cannot slow it down later on, as I see it.

Mr. ANDERSON. Will the EPA and the Corps receive more regulatory personnel to help implement this new mitigation policy in the field?

Ms. WILCHER. The Administration's budget for fiscal year 1991 has significant increases for our Office of Wetlands Protection.

Mr. ANDERSON. You are getting some additional funds?

Ms. WILCHER. Yes, we will be asking Congress for those in the 1991 budget. However, I really don't expect that a lot of extra resources, either in EPA or in the Corps, will be needed to implement this policy. The reason for that is primarily because the MOA is consistent with the Guidelines that have been on the books for a very long time. We believe a significant number of the delays have been caused by confusion that may have existed in the minds of some field personnel disagreeing with EPA about the mitigation sequencing. It is our hope and our expectation that instead of causing delays the MOA will, in fact, expedite the process.

Another point in that regard is that the MOA was published in the Federal Register and sent out to the Corps districts and EPA Regional Offices in November. The modifications that occurred in this final version are fairly slight. We expect that it has been out there and the subject of a lot of discussion for some period of time so it shouldn't be too new or difficult for them.

Mr. ANDERSON. I bet there are a lot of people out there questioning things.

Ms. WILCHER. The third point is that with regard to the existing permits already in the pipeline, this MOA will not apply. It only applies to those permits that are submitted on or after February 7th, the effective date of the MOA. The Corps and EPA personnel are not going to be going back and saying how does this MOA change how we were interpreting it. The MOA was designed so that it would not slow the process down.

Mr. ANDERSON. Mr. Secretary.

Mr. PAGE. Mr. Chairman, we track all of our permits by district and we see the numbers that are processed in 60, 90, and 120 days. We begin to put up a flag on 90 days. I think that tracking system, as simple as it is, will give us some yardstick of measure as we progress.

Mr. ANDERSON. Somebody back here asked if you had a room full of flags? How soon can we expect regulatory guidance to go out to EPA Regions and to Corps District offices concerning the new Memorandum of Agreement?

Mr. PAGE. It's out.

Mr. ANDERSON. Will they be getting some actual instructions all over the country?

Mr. PAGE. Yes, sir. I have a copy of the letter here that the Chief of Engineers sent. We talked to EPA before we did this and I believe they went out with one about the same time. On the 7th of February a letter went out to the districts and divisions giving them instructions of how to proceed on this new MOA.

Mr. ANDERSON. We would like a copy of that.

[February 7, 1990 Army Corps of Engineers Memorandum re Section 404 Mitigation Memorandum of Agreement follows:]

DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO ATTENTION OF:

7 FEB 1990

CECW-OR

MEMORANDUM FOR SEE DISTRIBUTION

Subject: **Section 404 Mitigation Memorandum of Agreement**

1. On 15 November 1989, the Department of the Army and the Environmental Protection Agency (EPA) signed a memorandum of agreement (MOA) that clarifies the procedures to be used in determining the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act Section 404(b)(1) Guidelines. The MOA becomes effective on 7 February 1990. A copy of the MOA is enclosed. This represents the official version and reflects the changes made to the 15 November 1989, MOA previously provided to you.

2. The MOA represents several years of hard work by both EPA and the Army Corps of Engineers. It, along with other recent accomplishments such as the new Federal wetlands delineation manual, are good examples of the renewed spirit of cooperation between EPA and the Corps at the Headquarters level. I am encouraged by these initiatives and committed to ensuring that the Corps Regulatory Program is undertaken in a manner fully consistent with the goals of the Clean Water Act and the Section 404(b)(1) Guidelines. I expect no less from each FOA Commander, Office of Counsel, and Regulatory staff.

3. The MOA is consistent with the President's goal of no overall net loss of wetlands and affirms the Corps existing policy of striving to avoid adverse impacts and offset unavoidable adverse impacts to aquatic resources. I fully support these initiatives and will work to ensure that they are integrated into all Corps activities. This includes site selection, plan development, maintenance, and operation of Corps projects, as well as the Regulatory Program. It is important to emphasize, however, that while the MOA's implementation can contribute to a goal of no overall net loss of the nation's remaining wetland base, the MOA does not establish a no net loss policy. In fact, the MOA expressly recognizes that achieving no net loss of wetlands values and functions is not possible for every permit action. The President's Domestic Policy Council Interagency Working Group on Wetlands is currently developing policy on no overall net loss of wetlands.

4. The MOA interprets and provides internal guidance and procedures to the Corps and EPA field personnel for implementing existing Section 404 permit regulations. The MOA does not change substantive regulatory requirements but instead provides a

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SUBJECT: Section 404 Mitigation Memorandum of Agreement

procedural framework for considering mitigation so that all Corps and EPA field offices will follow consistent procedures in determining the type and level of mitigation necessary to ensure compliance with the Section 404(b)(1) Guidelines. The MOA clarifies requirements contained in the Section 404(b)(1) Guidelines in response to questions that have arisen on these requirements. Moreover, the MOA does not establish any new mitigation requirements beyond those currently found in the Guidelines or modify the existing Guidelines requirements. The MOA also maintains the flexibility of the Guidelines by expressly recognizing that no net loss of wetlands functions and values may not be achieved in each and every permit action.

5. As a result of recent conversations between Headquarters and FOA regulatory staffs, several questions have consistently been raised. In response, the Regulatory Branch staff has prepared the enclosed "Q's and A's" which address many of the issues raised. These Q's and A's have been reviewed and agreed to by EPA. EPA will send the Q's and A's, as well as a similar memo to all EPA Region Offices.

6. The Mitigation MOA represents a most significant and positive step in emphasizing our commitment to accomplishing our mission of restoring and maintaining our valuable aquatic resources. Further, I am confident that the MOA will facilitate continued improvement in our daily relations with EPA, as well as other resource agencies.

7. Additional questions or comments may be directed to Dr. John Hall, Acting Chief, Regulatory Branch, at (202) 272-1785 or Mr. Michael Davis, the Regulatory Branch POC, at (202) 272-0201.

Encls

H. J. HATCH
Lieutenant General, USA
Commanding

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(see Page 3)

# MEMORANDUM OF AGREEMENT BETWEEN THE ENVIRONMENTAL PROTECTION AGENCY AND THE DEPARTMENT OF THE ARMY CONCERNING THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER ACT SECTION 404(b)(1) GUIDELINES

*I. Purpose*

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines.

Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR 325.5(b)(1))[1]. This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determination of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its positions on compliance with the Guidelines for

[1]Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

proposed discharges and will reflect this MOA when commenting on standard permit applications.

***II. Policy***

A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be permitted under Section 404.[2] The types of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these more general types of mitigation.

B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal of no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(q) of the Guidelines.[3] However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.

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[2](except where Section 404(b)(2) applies).

[3]Section 230.3(q) of the Guidelines reads as follows: "The term practicable means available and capable of being done after taking into consideration *cost, existing technology, and logistics in light of overall project purposes.*" (Emphasis supplied)

C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impacts have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advance Identification areas (Section 230.80), and State Coastal Zone Management Plans). It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses.

In determining "appropriate and practicable" measures to offset unavoidable impacts, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**[4] Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.[5] The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites[6] are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment.

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[4]Avoidance as used in the Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

[5]It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

[6]Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).

**2. Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means for minimizing impacts of an activity.

**3. Compensatory Mitigation.** Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close physical proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought.

Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objectives of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

### *III. Other Procedures*

A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining an understanding of other state or tribal, or local requirements. Compliance with other statutes, requirements and reviews, such as NEPA and the Corps public interest review, may not in and of themselves satisfy the requirements prescribed in the Guidelines.

B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgment of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases, as discussed in Section II.B of this MOA.[7] In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less than 1 to 1 for areas where the functional values associated with the

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[7]For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition, avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands. EPA and Army, at present, are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

C. The Guidelines are the environmental standard for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals.

D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the condition is actually achieved. Any time it is determined that a permittee is in non-compliance with mitigation requirements of the permit, the Corps will take action in accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g., conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonably implementable or enforceable, the permit shall be denied.

F. Nothing in this document is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.

G. This MOA shall take effect on February 7, 1990, and will apply to those completed standard permit applications which are received on or after that date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

2/6/90

Robert W. Page (date)
Assistant Secretary of the Army
(Civil Works)

LaJuana S. Wilcher 2/6/90

LaJuana S. Wilcher (date)
Assistant Administrator for Water
U.S. Environmental Protection Agency

Mr. DAVIS. Mr. Chairman, I might add that both agencies held conference calls with all of their field offices on February 7th. EPA, and I am sure in the Corps as well, are building it into regulatory training courses that we're holding over the course of this spring. There will be many, many opportunities to ensure that everyone in the field understands the new procedures.

Mr. ANDERSON. The preamble and footnote 7 of the Agreement speak about particular mitigation problems found in Alaska. How will mitigation be treated in Alaska?

Ms. WILCHER. There are certain circumstances, such as areas where there is permafrost, that if we sought to have compensatory mitigation—that is to create a wetland to replace that which is being filled—technologically, we would be unable to do it. There is a special recognition that the science and technology simply is not there. We have traditionally recognized that special condition. It clearly falls under the regulatory difinition of what is practicable and what is not. We are not requiring mitigation unless it is practicable. In those circumstances we might try some other techniques such as those that were suggested by the National Wetlands Policy Forum— earlier restoration of gravel pits, or road beds, or things of that sort—that would benefit the environment and hopefully help restore the functional losses that might have occurred. The permafrost areas in Alaska certainly present a difficult and rather unique problem.

Mr. ANDERSON. What legal effect does the Agreement's preamble have? Doesn't that bring a new story in there?

Ms. WILCHER. It is interpretative in nature. Again, it is consistent with our existing definitions in the Guidelines and the MOA about what is practicable and what is not. We don't require mitigation if it can't be done in a practicable fashion, as it is defined in the Guidelines.

Mr. ANDERSON. Is it as binding on the agencies as the Memorandum of Agreement is?

Ms. WILCHER. I am not sure. Since the Memorandum of Agreement is guidance itself and interpretative guidance, I am unsure about the effect of a preamble. But, again, we believe it is consistent with the MOA and we expect our field personnel to look at it and take it into consideration.

Mr. ANDERSON. Mr. Secretary, I have a question that may be for you. How does the Memorandum of Agreement affect the Corps' public interest review process?

Mr. PAGE. I don't—I see it would enlighten the public interest.

Mr. ANDERSON. Mr. Barrows.

Mr. BARROWS. The public interest review process, as you know, considers a lot of factors. One of the factors that is included is the 404(b)(1) guidelines. It is very clear that if the project is not going to comply with the guidelines, a permit cannot be issued and, therefore, we don't get to a public interest determination in that respect. The MOA does not change any of the requirements or the substance within the guidelines. So, in that context, there won't be any affect.

Mr. ANDERSON. Do you have anything further?

Mr. MCEWEN. Thank you, Mr. Chairman.

I would request that the Guidelines Mitigation Memorandum of Agreement questions and answers be included in the record so that we can see their present thinking on implementation.

[Section 404(b)(1) Guidelines Mitigation MOA "Questions and answers" follow:]

**SECTION 404(b)(1) GUIDELINES MITIGATION MOA "QUESTIONS AND ANSWERS"**

Q1. Is the MOA a wetlands mitigation policy?

A1. No. The purpose of the MOA is to provide general guidance to Corps and EPA field offices on 404(b)(1) Guidelines mitigation requirements for standard permit applications in all waters of the United States, including wetlands. As such, the guidance reflects agency policy and procedures but does not itself, establish new policy.

Q2. Does the MOA establish a No Net Loss of wetlands policy?

A2. The MOA is not, in itself, a no net loss policy and neither the Section 404 program in general, nor the MOA in particular, is designed to achieve the national goal of no overall net loss of wetlands. EPA and the Corps will strive to achieve the President's goal of no net loss; however, the MOA clearly recognizes that mitigation which is not appropriate or practicable will not be required, nor will each permit be required to achieve no net loss of wetlands.

Q3. What is mitigation sequencing?

A3. In the context of the Guidelines and the MOA it means first avoiding impacts through the selection of the least damaging practicable alternative; second, taking appropriate and practicable steps to minimize impacts; and finally compensating for any remaining unavoidable impacts to the extent appropriate and practicable.

Q4. Does sequencing mean you have to first pass 230.10(a), then 230.10(b), then 230.10(c), and finally 230.10(d)?

A4. No. While sequencing (i.e., avoidance, minimization, compensation) incorporates the requirements of Sections 230.10 (a) and (d), the requirements identified at Sections 230.10 (b) and (c) are not components of mitigation under the Guidelines.

Q5. What does the one for one functional replacement signify?

A5. The objective of wetlands compensatory mitigation is to provide, at a minimum, one for one functional replacement to achieve no net loss of wetland values. In the absence of more definitive information on the functions and values at a specific site, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, the MOA recognizes that this ratio may vary on a case-by-case basis and may not be appropriate and practicable in all cases.

Q6. Is it possible to issue a permit that causes a net loss of wetlands?

A6. Yes. Once a project passes 230.10(a),(b), and (c) of the Guidelines (also reference question number 4), a wetlands loss may occur when mitigation measures are not feasible, practicable or would accomplish only inconsequential reductions in impacts. However, it should be emphasized that a project that causes or contributes to significant degradation of the waters of the United States will fail 230.10(c) notwithstanding the exceptions for 230.10(d) noted in the above sentence.

Q7. Have the definitions of the terms "appropriate" and "practicable" been changed?

A7. No. Section 230.3(q) of the Guidelines defines the term practicable as meaning "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." Since the term appropriate is not explicitly defined in the Guidelines or Corps regulations, its meaning was clarified in the MOA to mean "appropriate to the scope and degree" of environmental impacts of a project (also reference question number 8).

Q8. Is appropriate mitigation based solely on the values and functions of the aquatic resource that will be impacted?

A8. Yes. A key objective of the Guidelines and the MOA is to offset unavoidable adverse impacts to aquatic resources. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. Further, under the Guidelines, appropriate

mitigation is required only to the extent that it is practicable. Public interest characteristics such as need and societal value are not factored into a determination of appropriate mitigation as determined by the Guidelines. Such considerations are, however, taken into account during the public interest review process.

Q9. Is there a preferred method for assessing functional values of aquatic resources?

A9. Not at this time. The Wetland Evaluation Technique (WET) considers a broad range of ecological functions and its use will likely increase. We realize that WET needs additional refinement and regionalization, both of which are underway. However, the best professional judgment of the Corps, EPA and resource agencies' representatives must continue to play a vital role in all resource assessments.

Q10. Is there sufficient flexibility built into the MOA to reflect the technical challenges represented in Alaska?

A10. Yes. EPA and the Corps recognize that the physical characteristics associated with wetlands underlain by permafrost pose scientific challenges regarding compensatory mitigation. Permafrost conditions, hydrology and climatic factors create technical problems which may make opportunities for wetlands creation and restoration not always practicable. The MOA states (see Section II.B.) that only appropriate and practicable mitigation is required under the Guidelines and, as a result, no net loss of wetlands functions and values may not be achieved in each and every permit action. This technical uncertainty emphasizes the need for Corps and EPA staff in Alaska to coordinate through established procedures such as the Abbreviated Permit Process and pre-application consultations to identify what is appropriate and practicable compensatory mitigation on a case-by-case basis.

Q11. Are there other areas of the country that also represent special challenges in the implementation of the MOA?

A11. Yes. In developing the MOA, the Corps and EPA recognized that the flexibility built into the Guidelines must also be incorporated into the provisions contained in the MOA in order to be responsive to varying ecological conditions that exist nationwide. An issue that has been

brought to our attention is how the MOA will affect certain environmental projects in Louisiana (projects where the specific purpose is to enhance the environment). The MOA recognizes these situations by providing that where EPA and the Corps agree, it may be appropriate to deviate from the mitigation sequence in circumstances "necessary to avoid environmental harm (e.g., to protect a natural aquatic community from saltwater intrusion...)."

Q12. Will mitigation banks and preservation of existing wetlands be allowed?

A12. The MOA recognizes that mitigation banking may be an acceptable form of compensatory mitigation. EPA and Army are developing additional guidance on this subject. In the meantime, mitigation banks will be considered for approval on a case-by-case basis as they have been in the past. Simple purchase or "preservation" may be acceptable only in exceptional circumstances. EPA and the Corps will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

Q13. How will the MOA affect applications in process?

A13. It doesn't. It applies to completed applications which are received on or after 7 February 1990.

Q14. Must an alternatives analysis and/or compensatory mitigation plan be completed before a public notice can be issued?

A14. No. The Corps regulations and application form are fairly specific about what information is needed to find an application complete. Information necessary to conduct a complete Guidelines or Public Interest Review is not required for the issuance of a public notice. If such information is provided by the applicant, however, it should be summarized and presented in the public notice.

Q15. Is it necessary to issue a new public notice for discharges of fill material associated with a compensatory mitigation plan, or part of a plan, that was not included in the original notice?

A15. Generally no. However, this is a judgment call and if the proposed changes result in a substantial increase in the scope of the overall project or there has been a demonstrated interest by the public, an additional notice may be required.

Q16. To what extent must the Corps coordinate changes in a proposed project, including mitigation plans, with the resource agencies?

A16. In general, all substantive changes should be coordinated. The Corps is responsible for determining the appropriate amount of coordination, keeping in mind that insufficient coordination is a criterion for permit elevation under the 404(q) MOAs.

Q17. Is the Corps still responsible for determining compliance with the 404(b)(1) Guidelines on a permit-by-permit basis?

A17. Yes. As in the past, Guidelines compliance determinations are the responsibility of the Corps. EPA will continue to respond to public notices as it has in the past using the MOA to develop its position (recommendations) on projects.

Q18. Does the MOA require the Corps to take an enforcement action whenever it discovers non-compliance with the mitigation requirements of a permit?

A18. No. The Corps is required to take action in accordance with 33 CFR Part 326 which establishes a discretionary responsibility regarding the initiation of enforcement actions. The Corps, as part of a new emphasis on permit compliance, is strongly encouraged to take appropriate action to ensure compliance with all permit conditions, particularly conditions imposed to satisfy the Guidelines. The MOA does not affect this initiative.

Q19. Does the MOA apply to after-the-fact applications?

A19. Yes.

Q20. How does the MOA affect Corps civil works projects?

A20. While the MOA focuses on the Section 404 regulatory program, the Corps plans to integrate the mitigation framework provided in the MOA into all Corps activities.

Mr. MCEWEN. Finally, if I may, would just be a comment. As I understand from the purpose of this hearing today, the reason we have the Memorandum of Agreement is for more consistent application of the current rules. If that is the case, then that is obviously a step forward. The Chairman asked the question, will this slow anything down? Very little can be slowed down very little. The current process has a lot of problems that virtually every member of the committee and every Member of Congress has problems with. I am hopeful that is the reason for the MOA, that we can clean up some of these problems.

Let me just remind you of what you probably already know. There are many that make very sizable incomes out of using the rules of various departments in order to prevent development, whether it be development of energy resources or anything else. There are those oftentimes of third generation wealth that have come from very secure backgrounds who view those that are attempting to make their way in a free enterprise system as necessary cast offs that will somehow disrupt the lifestyle to which they are entitled and accustomed without the offense of anyone else being able to produce an income for themselves or their family. And they will do what they can to use the rules and regulations to accomplish that task. It is a responsibility of fair-minded regulators to be able to see through that. The example that I cited, where the Fish and Wildlife Service said that you must have mitigating land that has beneath it energy, is testimony to precisely that to which I am speaking.

I am hopeful that you will sense the frustration of all of us who on a regular basis, every 24 months, secure our employment by meeting and asking the support of those who pay the taxes and pull the wagon in this country and who are not impressed by excessive Government regulation that says to a farmer or to a home builder or to a town chamber of commerce that wants to have their children grow up and go to work in their own locality that they have to somehow fight these battles out with interminable shifts of paper and lawyers.

So I hope this is a step forward. I thank you for your testimony today. And I am sure we will do it again in a few months to see how we are progressing.

Mr. PAGE. Thank you.

Mr. ANDERSON. Thank you very much.

[The prepared statement of Mr. Page appears on page 53.]

[The prepared statement of Ms. Wilcher appears on page 63.]

Mr. ANDERSON. Thank you. This hearing is adjourned.

[Whereupon, at 4:05 p.m., the hearing was adjourned, to reconvene at the call of the Chair.]

*DEPARTMENT OF THE ARMY*
*OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY*
*(CIVIL WORKS)*

*COMPLETE STATEMENT OF*
*ROBERT W. PAGE*
*ASSISTANT SECRETARY OF THE ARMY*
*(CIVIL WORKS)*

*BEFORE THE*
*SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT*
*COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION*
*U. S. HOUSE OF REPRESENTATIVES*

*FEBRUARY 20, 1990*

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Mr. Chairman and members of the Subcommittee, I am Robert W. Page, Assistant Secretary of the Army for Civil Works.

I am pleased to be here this afternoon to discuss the recently signed Memorandum of Agreement (MOA) between the Environmental Protection Agency (EPA) and the Department of the Army. The MOA, which was implemented on February 7, 1990, provides general guidance on the type and level of mitigation required under the Clean Water Act Section 404(b)(1) Guidelines. While I plan to address the specifics of the MOA, I would also like to provide some general background on the Army Corps of Engineers regulatory program.

As you know, protecting and wisely managing our Nation's remaining wetlands has moved to the forefront of the Nation's environmental conscience. President Bush has stated that his Administration will protect and preserve wetlands and adopt a national goal of no net loss of these valuable aquatic resources. At the President's direction, the Domestic Policy Council (DPC) has established an interagency task force on wetlands. The DPC task force is charged with developing a comprehensive set of recommendations to implement the President's goal of no overall net loss of existing wetlands. We wholeheartedly support the President's wetlands initiative and will work to strengthen our existing programs, as necessary, that protect, maintain, and restore wetlands.

## CORPS REGULATORY PROGRAM BACKGROUND

Perhaps the single most talked about program of the Corps of Engineers is its regulatory program. The Army Corps of Engineers has been regulating certain activities in the Nation's waters since 1890. Until the 1960's, the primary purpose of the Corps regulatory program was to protect navigation. Since that time, the program has been broadened by Administration initiatives, legislation, and court decisions so that it now considers a full range of public interest factors for both the protection and utilization of water resources.

The Corps primary regulatory authorities are:

- **Section 10 of the Rivers and Harbors Act of 1899**, which prohibits the obstruction or alteration of navigable waters of the United States without a permit from the Secretary of the Army (33 U.S.C. 403);

- **Section 404 of the Clean Water Act**, which prohibits the discharge of dredged or fill material into waters of the United States without a permit from the Secretary of the Army (33 U.S.C. 1344); and

- **Section 103 of the Marine Protection, Research, and Sanctuary Act** prohibits the transport of dredged material for purposes of ocean dumping without a permit from the Secretary of the Army (33 U.S.C. 1413).

About 40 percent of the 15,000 standard permit applications submitted to the Corps each year require evaluation only under Section 10; 30 percent involve both Section 10 and 404; and 30 percent involve Section 404 only. Applications are evaluated in terms of a public interest balancing process; that is, the anticipated benefits of the proposed project are balanced against the reasonably foreseeable detrimental impacts. In addition to this public interest review, Section 404 applications also are

evaluated to ensure compliance with the Section 404(b)(1) Guidelines. The Guidelines, which were promulgated in December 1980 (40 CFR, Part 230) by EPA, in cooperation with the Army, contain the substantive environmental criteria by which the Corps reviews all Section 404 permit applications. Corps permits are issued only when the work involved complies with the Guidelines and on balance is not contrary to the public interest. The District Engineer's decision to issue or deny a permit normally represents final agency action.

## MITIGATION MOA

I will devote the remainder of my testimony to the mitigation MOA. The EPA/Army MOA, which was signed on February 6, 1990, provides general guidance on the mitigation requirements of the Section 404(b)(1) Guidelines. The MOA was to take effect on December 15, 1989. However, EPA and Army agreed to a delay in implementing the MOA to allow an opportunity for further discussions with other Federal agencies and the Domestic Policy Council Wetlands Task Force. As a result of these discussions, some changes were made to clarify the purpose of the MOA and its relationship to the Guidelines. The MOA became effective on February 7, 1990. We strongly believe that the MOA will contribute in a very positive way to our continuing efforts to administer effectively the Section 404 regulatory program. The Army is committed to implementing the Section 404 program in a manner

consistent with the objectives of the Clean Water Act as reflected in the 404(b)(1) Guidelines. The MOA reflects this commitment.

Development of the MOA started in 1985, in part, as a result of Congressional interest. For example, during the July 1985 Senate Section 404 Oversight Hearings, Senator Chafee expressed an interest in a joint mitigation policy under the 404(b)(1) Guidelines. The Corps in its 1986 regulations notified the public of the effort to develop additional guidance on Guidelines mitigation.

The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include:

(1) avoiding impacts by not taking an action or parts of an action,
(2) minimizing impacts by limiting the degree of the action,
(3) rectifying impacts by repairing, rehabilitating or restoring the affected environment,
(4) reducing impacts over time through preservation or maintenance of the affected environment, and
(5) compensating for impacts by replacing or providing substitute resources.

The types of mitigation enumerated by CEQ are compatible with the requirements of the Section 404(b)(1) Guidelines; however, as

a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The MOA speaks in terms of these more general types of mitigation.

The purpose of the MOA is to articulate and clarify the procedures that Corps District Engineers use to determine the type and level of mitigation necessary to demonstrate compliance with the Guidelines. Also, EPA will use the MOA in developing its positions on compliance with the Guidelines when commenting on standard permit applications. The MOA is a clarification of existing regulations and was developed in response to questions that have arisen from Corps and EPA field offices. The MOA does not contain requirements beyond those currently found in the Guidelines, nor does the MOA establish any new basis for denying Section 404 permits.

Key points in the MOA include:

- The MOA applies to standard individual permits only. This does not include letters of permission, regional permits, nationwide permits, or programmatic permits.

- The MOA is applicable to all waters of the United States, including most wetlands.

- The MOA articulates that no overall net loss of wetlands functions and values is a goal of the Corps regulatory program. In this regard, the MOA sets forth a goal of one for one functional replacement of wetlands values. In the absence of information on functions and values, a one for one wetlands acreage replacement will be considered. However, the MOA preserves flexibility in the permit process by recognizing that "no net loss of wetlands functions and values may not be achieved in each and every permit action."

- The MOA recognizes that wetlands differ in terms of functions and values and the amount of mitigation required will vary. In this regard, the ratio of required mitigation may be greater where the functional values of the area are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ratio may be less for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.

- The MOA provides general guidance that mitigation will be considered in the sequence of (1) avoiding impacts by selecting the least damaging practicable alternative, (2) minimizing impacts and (3) compensating for any remaining unavoidable impacts to the extent practicable.

- Mitigation required to satisfy any of the steps in the sequence noted above must be appropriate to the scope and degree of impacts and must be practicable. The term practicable, as defined in the 404(b)(1) Guidelines, means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

- The MOA recognizes that compensatory mitigation may not be used as a means of reducing environmental impacts during the selection of the least damaging practicable alternative.

- The MOA recognizes the scientific uncertainty often associated with some forms of compensatory mitigation such as wetlands creation.

- Only in exceptional circumstances will the preservation of existing wetlands be considered an acceptable form of compensatory mitigation.

- The MOA specifies that permit compliance monitoring is an important aspect of mitigation.

The MOA provides an interpretation of the Guidelines and a consistent procedural framework for all Corps and EPA field offices to follow in the consideration of mitigation requirements under

Section 404. We believe that the MOA guidance is consistent with existing regulations and the objectives of the Clean Water to "restore" and "maintain" the chemical, physical, and biological integrity of the Nation's waters, including wetlands. It is important to note that the MOA is not, in and of itself, a no net loss policy and neither the Section 404 program in general, nor the MOA in particular, can be expected to achieve the national goal of no net loss of wetlands. The Corps will strive to advance the President's goal of no net loss of the Nation's remaining wetlands through our regulatory programs. However, the MOA clearly recognizes that within the context of the 404 program, only mitigation which is appropriate or practicable will be required.

In the preparation of the MOA, EPA and the Corps recognized the need to retain the flexibility afforded by the Guidelines which allow us to respond appropriately to regional variations and circumstances that exist across the country.

We expect that the primary impact of the MOA will be on the Corps and EPA as they must ensure that their comments and actions are consistent with the Section 404(b)(1) Guidelines. While some regional changes in mitigation practices by some Corps and EPA field offices are anticipated, within a framework of reasonable interpretation, the MOA will provide for implementation of the regulatory program with greater certainty and less variation. We will closely monitor implementation of the MOA nationwide in order

to make necessary revisions or to prepare supplementary guidance as experience may dictate. We further recognize that regulatory revisions or supplementary guidance may ultimately be appropriate to reflect directions or conclusions regarding no net loss of wetlands as provided by the DPC Wetlands Task Force.

In closing I would like to emphasize our commitment to not only the mitigation MOA, but the Corps regulatory program in general. The Corps has a long history as an "honest broker" in administering our regulatory programs. This will continue as we move into our second century of regulating activities in our Nation's waters. The EPA/Army mitigation MOA, the January 1989 MOA's on enforcement and jurisdictional boundaries, and the January 1989 Federal interagency wetlands delineation manual all represent very positive steps in our efforts to provide consistent national guidance on the Corps Regulatory Program. In our view, all of these initiatives properly clarify the regulatory process and consequently increase predictability.

Mr. Chairman, that concludes my statement. I will be happy to answer any questions that you or the members of the Subcommittee might have.

STATEMENT OF
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BEFORE THE
SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

February 20, 1990

Good afternoon, Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to be with you today to discuss the Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the determination of mitigation under the Clean Water Act Section 404(b)(1) Guidelines (MOA). This MOA reflects over five years of effort by EPA and Army to develop internal guidance and to provide clarification regarding the level of mitigation necessary to demonstrate compliance with requirements under the Section 404(b)(1) Guidelines (Guidelines).

Before I discuss the MOA itself, I believe it is important to briefly review EPA's authorities under Section 404 of the Clean Water Act and to provide some relevant background regarding the development of the MOA. The Section 404 permit program regulates discharges of dredged or fill material into "waters of the United States," a term which includes wetlands. The permit program is administered by the U.S. Army Corps of Engineers. The Corps is given the responsibility under the Act to coordinate the review of permit applications and, based on this review, to

decide whether a particular permit should be issued. The Act requires that in making this decision, the Corps apply the environmental standards contained in the Guidelines promulgated in 1980 by EPA in conjunction with Army.

The Guidelines establish the environmental cornerstone for the Section 404 regulatory program. The fundamental precept of the Guidelines is that dredged or fill material should not be discharged into the aquatic ecosystem unless it can be demonstrated that (1) the discharge will not have an unacceptable adverse impact on the aquatic environment, either separately or when viewed in terms of its cumulative impact, and (2) there are no less environmentally damaging practicable alternatives. The Guidelines further require that no discharge should be permitted unless appropriate and practicable steps have been taken to minimize potential adverse impacts of the discharge on the aquatic ecosystem. The Guidelines define practicable as available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

The principal focus of the Guidelines is to seek first to avoid the alteration or destruction of waters of the United States, including wetlands, through a careful evaluation of practicable alternatives. This "avoidance first" focus reflects

the critical realization that an immensely valuable resource is disappearing.

The dynamic interaction of land and water that occurs in wetlands often results in highly productive ecosystems serving numerous valuable environmental functions, such as providing food and habitat for many species of fish and wildlife and improving surface water quality. Wetlands also provide other economic and societal benefits including commercial fishing, flood protection, groundwater recharge, and recreation. Wetlands loss rates continue to be very high, estimated currently to be at least 300,000 acres per year. For example, bottomland hardwood wetland acreage in the lower Mississippi Valley and prairie potholes in the upper Mid-West have decreased by over 50 percent, presenting major problems for waterfowl and wildlife populations, and is one factor which can lead to the placement of additional plants and animals on threatened and endangered species lists.

The requirements for mitigation under the Guidelines, as well as the Corps' Public Interest Review, have not always been uniformly implemented, generating uncertainty and disagreements between EPA and Army. In response to this problem, work on joint EPA/Army mitigation guidance was initiated in 1985 to clarify mitigation requirements under the Guidelines. After five years of discussions between EPA and Army, Assistant Secretary Robert Page and I signed a Mitigation MOA intended to articulate the

policy and procedures to be used by agency field personnel in the determination of necessary mitigation in compliance with the Guidelines. This MOA was to become effective on December 15, 1989.

The effective date of the MOA was extended until February 7, 1990, in order to provide the opportunity to discuss the MOA with interested Federal officials. These discussions were useful to us and resulted in several modifications to language in the MOA intended to clarify the agencies' intent regarding the scope and effect of the MOA. These changes are intended to clarify the agencies' intent regarding the MOA. Since the Guidelines underwent notice and comment rulemaking at the time of their promulgation the same procedure would be necessary to amend them. On February 6, 1990, Assistant Secretary Page and I signed a revised version of the MOA which became effective on February 7.

Key Provisions of the MOA

The MOA interprets and provides internal guidance and procedures to Corps and EPA field personnel for implementing existing Section 404 permit regulations. The MOA does not change substantive regulatory requirements, but rather provides a procedural framework for determining mitigation, so that all Corps and EPA field offices will follow consistent procedures in ensuring compliance with the Guidelines. Key provisions

established in the Guidelines and articulated in the MOA include the following:

1. Sequencing - The MOA clarifies that mitigation under the Guidelines occurs in a clear sequence of avoidance of adverse impacts through the evaluation of practicable alternatives, minimization through methods such as project modification to reduce impacts as the second step, and lastly, compensation of unavoidable impacts through restoration or creation. The MOA allows flexibility regarding application of the sequence when appropriate to avoid environmental harm, achieve environmental gains, or insignificant environmental losses are involved.

2. Mitigation Banking/Preservation - The MOA recognizes that mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Until additional guidance is developed on this subject, we will consider mitigation banks for approval on a case-by case basis, as they have been in the past. In addition, simple purchase or preservation of existing wetlands resources may only in exceptional circumstances be accepted as compensatory mitigation.

3. Compensatory Mitigation - The MOA explains that the objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally, for wetlands, such mitigation should provide, at a minimum, one-for-one functional replacement (i.e., no net loss of values) where appropriate and practicable, with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan. One-to-one acreage replacement may be used as a reasonable surrogate for no net loss of functions and values in the absence of definitive information on the functions and values of a particular wetland site. The MOA also provides that the Corps will strive through the Section 404 program to advance the Administration's goal of no overall net loss of wetlands, recognizing, however, that the level of compensatory mitigation appropriate and practicable for each individual permit decision may not always fully meet the goal.

Conclusions

We expect the Domestic Policy Council (DPC) Interagency Task Force on Wetlands will promptly pursue the definition of a "no net loss" policy and the development of recommendations for attainment of the goal of "no net loss" of the Nation's wetlands. As part of that process, we expect the Task Force to hold a series of public meetings around the country to solicit public

views on appropriate strategies for achieving the "no net loss" goal, including both regulatory and non-regulatory approaches.

These public meetings also will address specific issues such as losses associated with agricultural activities and losses in specific geographic areas such as the Mississippi River Delta and along the Louisiana Gulf Coast. The Task Force additionally will consider the challenges posed in Alaska where a high proportion of developable land is wetlands and where technical difficulties exist for compensatory mitigation of wetlands underlain by permafrost.

After the DPC Task Force fulfills its charter, we will reevaluate the MOA to ensure consistency between Task Force recommendations regarding no net loss and agency guidance implementing those recommendations.

In conclusion, I would like to emphasize that the MOA, and the permit process it is written to explain, are based on existing regulations that remain unchanged. These regulations, in turn, are based on the statutory language and Congressional intent of the Clean Water Act. The principles embodied in the Guidelines have been refined by years of experience in the regulatory program and the MOA is intended to reflect these principles and experience rather than to supplant them.

I am confident that the MOA will improve the effectiveness of the Section 404 permit program by improving consistency and predictability in the determination of necessary mitigation. As a result of this increased effectiveness, we anticipate reduced permit processing times, an improved capacity to protect critical aquatic resources, and a better understanding of the existing mitigation requirements by participants in the permit process.

As important as those results of the MOA will be to the effective operation of the Section 404 regulatory program, I am particularly enthusiastic about the spirit of cooperation now existing between EPA and the Corps of Engineers. This MOA, and other recent agreements reached between the agencies, is a manifestation of this spirit that I am confident will contribute significantly as we move to protect wetlands into the nineties.

I appreciate the opportunity to represent EPA at this hearing and to provide our perspective on this new Agreement. With that, I conclude my formal remarks and will be pleased to answer any questions members of the Subcommittee may have.